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Ninth Circuit Review—Developments in Criminal Law and Procedure in the Ninth Circuit, 1978: A Survey

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DEVELOPMENTS IN CRIMINAL LAW AND PROCEDURE IN THE NINTH CIRCUIT, 1978: A SURVEY

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I. ARREST, SEARCH, AND SEIZURE

A. Scope of the Fourth Amendment

1. Reasonable expectation of privacy

The fourth amendment to the United States Constitution¹ prohibits unreasonable searches and seizures by the government. In *Katz v. United States*,² the Supreme Court explained that the existence of a fourth amendment violation depends in large part on whether or not the person affected entertained a legitimate expectation of privacy.³ Justice Harlan, concurring in *Katz*, set forth the appropriate test: it must appear "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."⁴ However, the fourth amendment is not merely an embodiment of "the right to privacy."⁵ In terms of fourth amendment jurisprudence, the invasion of a privacy

1. U.S. CONST. amend. IV. The amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 389 U.S. 347 (1967).

3. *Id.* at 351-52.

4. *Id.* at 360, 361-62.

5. *Id.* at 350-51.

interest must be accompanied by governmental action in the form of a search or seizure. Thus, the amendment's proscription does not apply to private action,⁶ and it is not applicable when the governmental activity at issue does not involve a search or a seizure.⁷

Recently, in *Rakas v. Illinois*,⁸ the Supreme Court applied even more rigorously the principle that the rights secured by the fourth amendment are personal ones.⁹ The Court rejected the notion that shorthand phrases such as "legitimately on the premises"¹⁰ or "target" theory of standing¹¹ encapsulate the core of fourth amendment protections. Instead, the Court insisted that the analysis must focus on the substantive rights of the particular criminal defendant claiming a fourth amendment violation, that is, on the defendant's privacy interests in the particular area searched and property seized.¹² The petitioners in *Rakas* were passengers in a car that had been stopped and searched; incrimi-

6. *Id.* ("right to be let alone by other people . . . left largely to the law of the individual States"); *United States v. Rich*, 580 F.2d 929, 939 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (evidence admissible when obtained by private search of abandoned motel room); *United States v. Louderman*, 576 F.2d 1383, 1389 (9th Cir. 1978) (absent FBI approval, use of pen register by telephone company lacks requisite state involvement).

7. *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1277 (9th Cir. 1979) (no search or seizure when illegal alien voluntarily spoke to INS agents who knocked on her door); *United States v. Olander*, 584 F.2d 876, 888 (9th Cir. 1978) (boarding a boat to serve civil process is neither a search nor a seizure); *United States v. Miroyan*, 577 F.2d 489, 492-93 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (use of transponder to monitor location of rented airplane held not a search). *See also* *United States v. Jernigan*, 582 F.2d 1211, 1212-13 (9th Cir.), *cert. denied*, 439 U.S. 991 (1978) (agents' or informants' consent to recording of conversation renders fourth amendment claim moot); *United States v. Walker*, 575 F.2d 209, 212 (9th Cir.), *cert. denied*, 439 U.S. 931 (1978) (co-owner's consent to search of photos validates invasion of appellant's privacy); *United States v. King*, 587 F.2d 956, 962 (9th Cir. 1978) (sound recording made by agent who is a party to conversation or one made with the consent of one of the parties to the conversation not a violation of the fourth amendment).

8. 439 U.S. 128 (1978).

9. The Court reiterated that, being personal rights, they may not be vicariously asserted. *Id.* at 133-34 (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969)). However, the Court specifically refused to characterize the initial inquiry in terms of standing, preferring an analytical approach based on "the extent of a particular defendant's rights under the Fourth Amendment." *Id.* at 139. It is therefore unnecessary to determine whether or not a particular search was violative of another's rights. *Id.* at 150.

10. The Court in *Rakas* explained that the phrase "legitimately on the premises," originally coined in *Jones v. United States*, 362 U.S. 257 (1960), was intended to reflect the notion that a person could have a reasonable expectation of privacy (and hence a legally sufficient interest under the fourth amendment) in a place he was using that was not his own home. *Id.* at 140-42. The insufficiency of its use as an analytical tool was evident from the disparate results in cases in which it had been literally applied. *Id.* at 145-46 n.13.

11. The *Rakas* petitioners had argued that any defendant at whom a search was directed should have standing to contest the use of evidence seized as a result of that search; this rule was urged in an attempt to broaden the *Jones* rule of standing. *Id.* at 132-33.

12. *Id.* at 140-48.

nating evidence was found in the locked glove compartment and under the front seat of the car, which neither passenger owned. The petitioners argued, however, that the evidence seized should have been excluded from the trial. The Court held that the petitioners failed to show that the areas searched were ones in which "a passenger *qua* passenger . . . would . . . normally have a legitimate expectation of privacy."¹³

a. Abandoned property

In *Hester v. United States*,¹⁴ the Supreme Court held that the examination of the contents of abandoned bottles did not constitute a seizure cognizable under the fourth amendment.¹⁵ The Court explained that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields."¹⁶ Forty years later, the Court in *Katz* disavowed fourth amendment interpretations based solely upon location; however, the open fields doctrine was at least tacitly approved when the *Katz* Court stated "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."¹⁷ Thus, lower courts have reasoned that, while the open fields doctrine may have no independent vitality post-*Katz*, "open fields are not areas in which one traditionally might reasonably expect privacy."¹⁸

In *United States v. Basile*,¹⁹ the Ninth Circuit relied on the post-*Katz* "open fields" doctrine to find that the appellants did not have a reasonable expectation of privacy in an old truck, apparently abandoned, set on blocks "probably" 100 yards from the appellant's residence.²⁰ After discussing the facts, the court stated: "The trial court's conclusion that the defendants had no reasonable expectation of privacy with respect to the panel truck is amply supported by the evidence."²¹ Oddly, this conclusion was based in part upon a literal open fields approach rather than upon a *Katz* analysis. The court distinguished *Wattenburg v.*

13. *Id.* at 148-49.

14. 265 U.S. 57 (1924).

15. *Id.* at 58.

16. *Id.* at 59.

17. 389 U.S. at 351.

18. *United States v. Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976) (per curiam).

19. 569 F.2d 1053 (9th Cir.), *cert. denied*, 436 U.S. 920 (1978).

20. *Id.* at 1055.

21. *Id.* at 1056.

United States,²² which had held that a stockpile of Christmas trees was protected from governmental intrusion because the stockpile was within the curtilage of a lodge operated by the defendant.²³ However, the basis for distinguishing the cases seems to be the relative distances involved (in *Basile* 100 yards; in *Wattenburg* twenty to thirty-five feet), rather than an expectation of privacy test. The stockpile of trees in *Wattenburg* was "about five feet from a parking area used by personnel and patrons of the lodge"²⁴ (hardly a strong basis for a privacy argument),²⁵ while the truck in *Basile* was abandoned, if at all, in a relatively isolated area adjacent to the defendant's home.²⁶

b. Electronic tracking devices

Generally, the use of an electronic tracking device that merely aids visual surveillance does not violate a person's reasonable expectation of privacy.²⁷ However, because tracking cannot be accomplished until after the device is installed, the Ninth Circuit has used a two-step analysis to determine if a fourth amendment violation has occurred.²⁸ First, it must be shown that no violation was presented by the installation itself. Second, if the installation was proper, it must appear that the continued surveillance by the device did not violate a reasonable expectation of privacy.

In *United States v. Dubrofsky*,²⁹ the court applied that analysis to a situation in which a lawful customs search revealed that a package from Thailand contained heroin in its hollowed-out walls. Drug enforcement agents placed a tracking device in the package that not only facilitated surveillance of its location but also transmitted a different signal when the package had been opened. The court first found that it was "reasonable to suspect that a crated package like the one in controversy contain[ed] contraband."³⁰ This justified the initial installation.³¹

22. 388 F.2d 853 (9th Cir. 1968).

23. 569 F.2d at 1056.

24. *Id.*

25. 388 F.2d at 857 (reasonable expectation of privacy alternate holding).

26. 569 F.2d at 1055. *See also id.* at 1058 (Hufstedler, J., dissenting) (majority opinion cannot be reconciled with *Wattenburg*).

27. *See generally* Note, *Tracking Katz: Beepers, Privacy and the Fourth Amendment*, 86 YALE L.J. 1461, 1461-69 (1977).

28. *United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978); *United States v. Miroyan*, 577 F.2d 489, 492 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978). *Accord*, *United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976) (*per curiam*); *United States v. Hufford*, 539 F.2d 32, 33-34 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976).

29. 581 F.2d 208 (9th Cir. 1978).

30. *Id.* at 211.

31. *Id.* *See United States v. Botero*, 589 F.2d 430, 432 (9th Cir. 1978), *cert. denied*, 99 S.

Next, the court acknowledged that, while a device indicating no more than "here I am" is included within permissible techniques of surveillance,³² a device indicating that a package has been opened presents a different problem.³³ The court concluded that it *was* a slight intrusion, one analogous to the permissible use of binoculars designed for night. However, had the beeper related much more than the information that the package had been opened, it might well have been considered equivalent to a wiretap.³⁴

2. Investigatory stops and reasonable suspicion

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest."³⁵ However, the amendment only proscribes searches and seizures that are unreasonable.³⁶ Because the intrusion occasioned by an investigatory stop is less severe than that in an arrest, the standard by which reasonableness is judged has been defined as a "founded or reasonable suspicion"³⁷ rather than probable cause. Even if the local

Ct. 2162 (1979) (inspection by customs officials of shipment arriving from South America held lawful since they suspected it contained contraband). By statute, customs officials are permitted to open international mail to inspect its contents if they have "reasonable cause to suspect" the presence of contraband. The standard is milder than probable cause. *United States v. Ramsey*, 431 U.S. 606, 612-13 (1977).

32. "Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money . . . [are all permissible] in the usual case." 581 F.2d at 211.

See also *United States v. Miroyan*, 577 F.2d 489, 492 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (transponder attached to rented plane did not violate reasonable expectation of privacy any more than a beeper to aid surveillance of an automobile on public roads); *United States v. Botero*, 589 F.2d 430, 432-33 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2162 (1979) (beeper and fluorescent powder placed in package by narcotics agents pursuant to lawful customs search not violative of defendant's constitutional rights).

The Ninth Circuit has also indicated that a contraband dealer "cannot expect Fourth Amendment rights to protect his privacy in the same manner as one who deals in legitimate merchandise." *Id.* In addition, the Ninth Circuit has reaffirmed that the use of a pen register which produces a written record of all telephone numbers dialed from a given telephone is not subject to fourth amendment proscriptions. *United States v. Louderman*, 576 F.2d 1383, 1389 (9th Cir. 1978); *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254 (9th Cir. 1977).

33. 581 F.2d at 211-12.

34. *Id.*

35. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

36. *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Elkins v. United States*, 364 U.S. 206, 222 (1960).

37. The "founded suspicion" test enunciated by the Ninth Circuit has been found to be indistinguishable from the "reasonable suspicion" test of the United States Supreme Court. *United States v. Contreras-Diaz*, 575 F.2d 740, 744 (9th Cir.), *cert. denied*, 439 U.S. 855

police are involved, the federal standard for judging the legality of the stop is used.³⁸

The Ninth Circuit has found a reasonable suspicion justifying investigatory stops in the following factual settings: (1) when the suspect saw the patrol car, he backed up to a retaining wall over which he appeared to throw an object;³⁹ (2) after suspects requested birth certificates of deceased persons, they were followed and found to be driving a truck with license plates registered to another vehicle;⁴⁰ (3) when a suspect was found driving an old car, the right rear tire of which had no tread in violation of the vehicle code;⁴¹ (4) after being directed by a radio bulletin to investigate a possible burglary, police found suspects stooping over "suspiciously" at the rear of the car;⁴² (5) at a border patrol checkpoint for brief questioning;⁴³ (6) after a car exceeding the speed limit was stopped, some passengers gave contradictory explanations regarding their destination and others, unable to speak English, resembled " 'illegal aliens' with whom . . . [the officer] had previously come in contact."⁴⁴

Even if the stop is justified and the person is so "seized," the fourth amendment requires that the detention be " 'strictly tied to and justified by' " the circumstances that legitimized the initial stop.⁴⁵ In *United*

(1978) (citing *United States v. Rocha-Lopez*, 527 F.2d 476, 477-78 (9th Cir. 1976)). "In order for such a stop to be valid it must be based on a 'reasonable suspicion' that illegal activity had occurred or was occurring." *United States v. Orozco*, 590 F.2d 789, 792 (9th Cir.), *cert. denied*, 439 U.S. 1049 (1979).

The United States Supreme Court has defined a "reasonable suspicion" as those " 'specific and articulable facts' " to which an officer can point together with " 'rational inferences from those facts' " which " 'reasonably warrant' a belief that his safety or that of others is in danger." *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

38. *United States v. Orozco*, 590 F.2d 789, 792 (9th Cir.), *cert. denied*, 439 U.S. 1049 (1979); *United States v. Grajeda*, 570 F.2d 872, 874 (9th Cir. 1978); *United States v. Collom*, No. 77-1040, slip op. at 1186 (9th Cir. June 15, 1978). *But see* *United States v. Contreras-Diaz*, 575 F.2d 740, 744 (9th Cir.), *cert. denied*, 439 U.S. 855 (1978) (because state officer involved, initial inquiry on basis of California law subject to subsequent application of federal standards).

39. *United States v. Orozco*, 590 F.2d 789 (9th Cir.), *cert. denied*, 439 U.S. 1049 (1979).

40. *United States v. Kennedy*, 573 F.2d 657 (9th Cir. 1978).

41. *United States v. Grajeda*, 570 F.2d 872 (9th Cir. 1978).

42. *United States v. Collom*, No. 77-1040 (9th Cir. June 15, 1978).

43. *United States v. Rubalcava-Montoya*, 597 F.2d 140 (9th Cir. 1978).

44. *United States v. Contreras-Diaz*, 575 F.2d 740, 743 (9th Cir.), *cert. denied*, 439 U.S. 855 (1978). *See also* *United States v. Soloman*, 528 F.2d 88, 90-91 (9th Cir. 1975) (validity of stop upheld based on driver's inability to open hood of car and lack of knowledge of the coolant recovery system).

45. *Terry v. Ohio*, 392 U.S. 1, 18-19 (1968) (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

States v. Kennedy,⁴⁶ the Ninth Circuit found that the discrepancy in vehicle license information together with the receipt of birth certificates of deceased persons justified the initial stop but not the extended inquiry into the suspect's arrest history or possession of weapons.⁴⁷

3. Arrests and probable cause

An arrest, unlike an investigatory stop, requires "probable cause."⁴⁸ Probable cause to arrest demands a comparison between the arresting officer's own knowledge and an objective standard. At the moment of the arrest, the officer must have been aware of facts and circumstances based on " 'reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the . . . [suspect] had committed or was committing an offense'."⁴⁹ As in *United States v. Collom*,⁵⁰ however, a founded suspicion to detain may also ripen into probable cause to arrest.⁵¹

The Ninth Circuit has upheld findings of probable cause to arrest when supported by (1) evidence obtained from co-conspirators or informants together with the officer's independent observations,⁵² (2) information gathered with the aid of electronic surveillance devices,⁵³ and (3) direct observation by an officer or reasonable inferences drawn from circumstances surrounding an offense.⁵⁴ However, until *United*

46. 573 F.2d 657 (9th Cir. 1978).

47. *Id.* at 659. See also *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973) (jaywalking does not provide reason to suspect incidence of other crimes). Cf. *United States v. Contreras-Diaz*, 575 F.2d 740, 745 (9th Cir.), *cert. denied*, 439 U.S. 855 (1978) (totality of circumstances formed basis for rational suspicion of possible criminal activity).

48. *Draper v. United States*, 358 U.S. 307 (1959). If probable cause is established, the arrest is almost certainly valid regardless of whether the arresting officer had a warrant. See *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975) (arrest supported by probable cause never invalidated solely because of failure to secure warrant).

49. *United States v. Baker*, 567 F.2d 924, 926 (9th Cir. 1978) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

50. No. 77-1040 (9th Cir. June 15, 1978).

51. *Id.* slip op. at 1864-65 (radio bulletin directing officers to investigate plus additional information from suspect's explanation of activities sufficient to arrest).

52. *United States v. Blalock*, 578 F.2d 245, 247 (9th Cir. 1978); *United States v. Moreno*, 569 F.2d 1049, 1051-52 (9th Cir. 1978). See also *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1245 (1979) (court found probable cause necessary to justify arrests of illegal aliens based on informant's information coupled with conduct observed at petitioner's residence).

53. *United States v. Miroyan*, 577 F.2d 489, 491 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978); *United States v. Valentin*, 569 F.2d 1069, 1071 (9th Cir. 1978).

54. *United States v. Oaxaca*, 569 F.2d 518, 521 (9th Cir.), *cert. denied*, 439 U.S. 926 (1978) (get-away car in bank robbery registered to person residing near bank; officers saw suspect leave residence and hastily return when patrol car spotted); *United States v. Baker*, 567 F.2d

States v. Prescott,⁵⁵ the question of whether probable cause to arrest could be sufficient justification for a warrantless entry into a private residence had not been answered by the Ninth Circuit.⁵⁶ The court had avoided the question by finding that "exigent circumstances"⁵⁷ existed or that the building at issue was actually a place of business.⁵⁸

In *Prescott*, the court joined the District of Columbia⁵⁹ and Second Circuits⁶⁰ in holding that, absent exigent circumstances, officers having probable cause must first obtain a warrant before entering a dwelling to effect an arrest.⁶¹ Three months later in *United States v. Johnson*,⁶² however, the Ninth Circuit upheld a warrantless arrest inside a suspect's apartment. The court held that, even though there were no exigent circumstances and there was ample time to obtain an arrest warrant, probable cause existed for the arrest; therefore, appellant's constitutional rights had not been violated.⁶³ The distinction between the cases, which the court did not mention, is that in *Prescott* the officers literally kicked down the door, while in *Johnson* the agents

924, 926 (9th Cir. 1978) (suspects inextricably enmeshed with other in sale and delivery of contraband in which undercover agent participated).

55. 581 F.2d 1343 (9th Cir. 1978).

56. The Supreme Court has never resolved the issue, but has expressly reserved this "grave constitutional question" on several occasions. *Jones v. United States*, 357 U.S. 493, 499-500 (1958). See also *United States v. Watson*, 423 U.S. 411, 418 n.6 (1976) (warrantless arrest based on probable cause valid; subsequent search of car with consent also valid).

57. "Exigent circumstances" refers to that situation in which the constitutional warrant requirement with its consequent delay must yield to an urgent need for immediate police action. Immediate action is called for when the suspect is armed or might escape or when there is risk of destruction of evidence or risk of danger to officers or third persons. See *United States v. Botero*, 589 F.2d 430, 432 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2162 (1979) (contraband in imminent danger of destruction constituted an exigent circumstance justifying warrantless entry into private dwelling); *United States v. Flickinger*, 573 F.2d 1349, 1356 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978) (possible alerting phone call from arrested cohort increased hazard of risks noted above); *United States v. Valentin*, 569 F.2d 1069, 1071 (9th Cir. 1978) (transmitters in contraband having been discovered, the risk of destruction of evidence and suspect escape increased).

58. *United States v. Blalock*, 578 F.2d 245, 248 (9th Cir. 1978) (warrantless arrest lawful when consummated in business establishment during business hours). See *United States v. Santana*, 427 U.S. 38, 42 (1976) (citing *United States v. Watson*, 423 U.S. 411 (1976)) (suspect "not in an area where [she] had any expectation of privacy").

59. *Dorman v. United States*, 435 F.2d 385, 391 (D.C. Cir. 1970).

60. *United States v. Reed*, 572 F.2d 412, 424 (2d Cir. 1978).

61. *United States v. Prescott*, 581 F.2d 1343, 1350 n.1 (9th Cir. 1978) (citing *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Federal Rules of Criminal Procedure*, February 1978, Rule 41 at 70-72, and Advisory Committee Note at 73-76).

62. No. 77-3808 (9th Cir. Dec. 19, 1978).

63. *Id.*, slip op. at 4121.

knocked, used fictitious names, and were admitted voluntarily after the suspect opened the door and found the agents with their guns drawn.

Within the same three month period, the Ninth Circuit again avoided the issue of a warrantless arrest in a private residence by finding, in *United States v. Botero*,⁶⁴ that the arrest actually took place in the doorway of the suspect's apartment.⁶⁵ Citing *United States v. Santana*,⁶⁶ the court found that, because the arrest could have taken place when the suspect opened the door, the agents could have followed the suspect into the apartment to effect the arrest. Therefore, his retreat could not divert the arrest.⁶⁷

Finally, the validity of an arrest warrant supported only by a criminal complaint filed by the prosecutor rather than by probable cause went undecided in *Myers v. Rhay*.⁶⁸ The court held that "the proper time to challenge the probable cause underlying an arrest is prior to the prosecution of the case, while the illegal detention is in progress."⁶⁹

B. The Exclusionary Rule

The exclusionary rule is a judicially created remedy⁷⁰ providing fourth amendment protections against illegal searches and seizures by prohibiting the use of illegally obtained evidence by the prosecution in a criminal trial.⁷¹ The purpose of the exclusionary rule is "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures;"⁷² it is not designed to redress the injury to the privacy of the victim of the illegal search.⁷³ Therefore, the Supreme Court has emphasized that the exclusionary rule should be applied only in those areas in which "its remedial objectives are thought most efficaciously served,"⁷⁴ *i.e.*, when

64. 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2162 (1979).

65. *Id.* at 432.

66. 427 U.S. 38, 42 (1976) (doorway of a private residence held to be a public place).

67. *United States v. Botero*, 589 F.2d 430, 432 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2162 (1979).

68. 577 F.2d 504 (9th Cir.), *cert. denied*, 439 U.S. 968 (1978).

69. *Id.* at 507. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); *Ierardi v. Gunter*, 528 F.2d 929 (1st Cir. 1976).

70. *Weeks v. United States*, 232 U.S. 383 (1914) (exclusionary rule first enunciated, that fourth amendment rights were to be protected by suppressing illegally obtained evidence in federal prosecutions).

71. *Mapp v. Ohio*, 367 U.S. 643 (1961) (due process clause of fourteenth amendment requires that evidence obtained in unconstitutional searches and seizures is inadmissible in state courts, as well as federal courts, for use by the prosecution in criminal trials).

72. *United States v. Calandra*, 414 U.S. 338, 347 (1974).

73. 414 U.S. at 347.

74. *Id.* at 348. *See United States v. Ceccolini*, 435 U.S. 268, 275 (1978) (exclusion of a

future unlawful police conduct will thereby be deterred. Following this standard for application of the exclusionary rule, the Ninth Circuit declined to apply the exclusionary rule in 1978 in cases in which it thought the rule's deterrent purpose would not be furthered.⁷⁵ It also refused to apply the exclusionary rule when the fourth amendment violation played only a minimal role in discovery of evidence.⁷⁶

Application of the exclusionary rule is further limited by the require-

witness's testimony requires a more direct connection with the illegal search than exclusion of physical evidence); *Stone v. Powell*, 428 U.S. 465, 486 (1976) ("[D]espite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons."); *United States v. Romero*, 585 F.2d 391, 396 (9th Cir. 1978) ("In deriving the outer perimeters of the exclusionary rule, courts have . . . balance[d] the deterrence value of excluding a particular class of evidence against the policies in favor of admitting all evidence relevant to the fact-finding process.").

75. See *United States v. Romero*, 585 F.2d 391 (9th Cir. 1978) (where preparation of federal search warrant was not based upon evidence obtained by invalid state warrant, federal warrant was valid, and deterrent value of applying exclusionary rule was inapplicable); *United States v. Radlick*, 581 F.2d 225 (9th Cir. 1978) (Ninth Circuit declined to apply exclusionary rule, remanding case to district court for determination of the issue of whether proceeding under state warrant inconsistent with FED. R. CRIM. P. 41 was intentional, thus requiring application of the exclusionary rule); *United States v. Newell*, 578 F.2d 827, 834-35 (9th Cir. 1978) (little or no remedial effect would be achieved by excluding evidence gathered in military interrogation by military investigator in contravention of military regulations requiring presence of counsel); *United States v. Schmidt*, 573 F.2d 1057, 1063 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978) (exclusionary rule not applied because: (1) minimal interaction between U.S. and Peruvian officials did not support the defendant's contention that the Peruvian drug investigation was a "joint" operation with U.S., thus Peruvian authorities' conduct not attributable to U.S. officials; (2) subsequent confession was voluntary, not the fruit of coerced Peruvian confession; and (3) physical evidence was not the fruit of prior coerced confession); *United States v. Walker*, 569 F.2d 502, 504 (9th Cir.), *cert. denied*, 435 U.S. 976 (1978) (deterrence function of rule would not be served by retroactive application of *United States v. Fannon*, 556 F.2d 961 (9th Cir. 1977), *rehearing en banc denied*, 569 F.2d 1106 (9th Cir. 1978)) (fourth amendment reasonableness standards mandated for airline searches, where evidence was obtained by airline employee acting in good faith).

The Ninth Circuit also declined to apply the exclusionary rule in several cases involving foreign searches. See *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978) (fourth amendment exclusionary rule is inapplicable where circumstances of foreign search were not "extreme" or no joint venture between the foreign officials and U.S. officials existed). But see *United States v. Emery*, 591 F.2d 1266 (9th Cir. 1978) (substantial participation in the arrest process by both U.S. and Mexican officials supported a finding of joint venture, thus requiring suppression of a confession made in absence of *Miranda* warnings).

In addition, the Ninth Circuit refused to apply the exclusionary rule in a civil case. See *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979) (since exclusionary rule traditionally applies only when criminal or quasi-criminal sanctions might be imposed, it is not applicable to deportation proceedings).

76. See *United States v. Brock*, 571 F.2d 480, 484 (9th Cir. 1978) ("[I]f the illegally obtained leads were so insubstantial that their role in the discovery of the evidence sought to be suppressed 'must be considered *de minimis*,' then suppression is inappropriate.") (quoting *United States v. Bacall*, 443 F.2d 1050, 1056-57 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971)).

ment that the person asserting the illegality of the search or seizure have standing to do so.⁷⁷ In *Brown v. United States*,⁷⁸ the Supreme Court summarized the three requirements for standing, at least one of which must be met by the defendant for the standing requirement to be satisfied: defendant must (1) have been on the premises at the time of the search or seizure, (2) allege a proprietary or possessory interest in the premises, or (3) be charged with an offense that includes possession of the seized evidence as an essential element of the offense charged.⁷⁹

However, in the recent case of *Rakas v. Illinois*,⁸⁰ the Supreme Court held that meeting one of these requirements, by being "legitimately on the premises" at the time of the search, does not in and of itself establish the defendant's right to challenge the legality of the search or seizure.⁸¹ In its analysis, the Court rejected the "target theory,"⁸² which allows a court to examine the issue of standing by determining whether the search was directed at the defendant, without deciding whether that particular defendant's fourth amendment rights were violated.⁸³ Affirming its previous holding that fourth amendment rights are personal and cannot be asserted vicariously,⁸⁴ the Court held that a defendant's own reasonable expectation of privacy must have been violated by the search or seizure in order for the defendant to have stand-

77. See FED. R. CRIM. P. 41(e) (only a "person aggrieved" may move for suppression of illegally seized evidence).

78. 411 U.S. 223 (1973).

79. *Id.* at 229. See *Chapman v. United States*, 365 U.S. 610 (1965) (defendant with possessory interest in the premises searched has standing to challenge the legality of the search); *Jones v. United States*, 362 U.S. 257, 264-67 (1960) (when defendant was charged with a crime which included as an essential element possession of the evidence seized, "person aggrieved" standing requirement satisfied; court also found that defendant's being "legitimately on the premises" at the time of the search satisfied the "person aggrieved" standing requirement).

80. 439 U.S. 128 (1978).

81. *Id.* at 132-38.

82. The "target theory" states that the person at whom the search is directed may contest the validity of the search, even though his fourth amendment rights may not have been violated. *Id.* at 132-33. It thus considers the standing question (Was this defendant a target of the allegedly illegal search?) separately from the substantive question of whether defendant's fourth amendment rights were violated (Did this defendant have a reasonable expectation of privacy that was violated by the search/seizure?). *Id.* at 139. See *United States v. Cella*, 568 F.2d 1266, 1281 (9th Cir. 1977) (Ninth Circuit rejected "target theory" as a basis for standing).

83. 439 U.S. at 139.

84. *Id.* at 137-38 (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969) (evidence obtained by illegal electronic surveillance could only be suppressed against a defendant whose premises were illegally monitored; it could not be suppressed against co-defendants or co-conspirators whose fourth amendment rights were not violated)).

ing to challenge the admissibility of the evidence thus acquired.⁸⁵ It concluded that, while a defendant's legitimate presence on the premises at the time of the search and seizure may be relevant to establishing defendant's reasonable expectation of privacy, it is not controlling in determining defendant's standing to challenge the evidence.⁸⁶ Applying this analysis, the Court found that the facts in *Rakas* did not support the defendants' capacity to challenge the legality of the evidence. As passengers, the defendants were legitimately in the vehicle searched. However, they had neither a property or possessory interest in the automobile nor a reasonable expectation of privacy in the areas of the automobile searched (locked glove compartment and beneath front seat). Therefore, since the court concluded that their fourth amendment rights had not been violated, the defendants were unable to challenge the legality of the evidence used against them.⁸⁷

The Ninth Circuit had already adopted a similar approach to standing issues in the 1977 case of *United States v. Cella*.⁸⁸ In *Cella*, the court rejected the "target theory," requiring that a defendant's fourth amendment rights must have been violated by the search or seizure in order for him to have standing.⁸⁹ Decisions by the Ninth Circuit in 1978 involving issues of standing are consistent with this view.⁹⁰

The "fruit of the poisonous tree" doctrine is an extension of the exclusionary rule. It requires suppression of evidence obtained by means of unconstitutionally acquired evidence.⁹¹ In 1978, the Ninth Circuit

85. 439 U.S. at 139. The Court stated that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment rather than on any theoretically separate but invariably intertwined concept of standing." *Id.*

86. *Id.* at 148. The Court rejected defendants' argument that being "legitimately on the premises" (set forth in *Jones v. United States*, 362 U.S. 257, 267 (1960)) conferred standing. It stated that this standard was "too broad a gauge for measurement of Fourth Amendment rights." *Id.* at 142.

87. *Id.* at 149-50.

88. 568 F.2d 1266 (9th Cir. 1977).

89. *Id.* at 1281. In rejecting the "target theory," the court stated, "the rights protected by the Fourth Amendment are personal rights, and may be enforced by exclusion of evidence secured by means of an unlawful search and seizure only by one whose own protection and privacy was infringed by the search and seizure." *Id.*

90. See *United States v. Sturgis*, 578 F.2d 1296 (9th Cir. 1978) (when appellant claimed no proprietary interest in items seized or premises searched, he had no normal possessory standing, while lacking automatic standing since possession of stolen money is not an essential element of charge of armed bank robbery); *United States v. Rubalcava-Montoya*, 597 F.2d 140 (9th Cir. 1978) (although not present during transportation of illegal aliens, defendant had standing because he owned the vehicle searched).

91. *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963) (statements made by defendant at time of his arrest and narcotics taken from third party as a result of these statements were fruits of unlawful state action and should have been excluded from evidence).

applied the "fruit of the poisonous tree" doctrine in two situations: (1) to suppress evidence or testimony resulting from exploitation of physical evidence obtained in an illegal search⁹² and (2) to suppress evidence acquired through exploitation of statements made in the absence of *Miranda* warnings.⁹³

The "fruit of the poisonous tree" doctrine does not apply and evidence is admissible if: (1) the evidence could have been procured through lawful, independent means;⁹⁴ (2) the connection between the evidence introduced at trial and the initial search and seizure is so attenuated as to "dissipate the taint" of the original illegality;⁹⁵ or (3) the original search and seizure did not violate the fourth amendment.⁹⁶

92. See *United States v. Rettig*, 589 F.2d 418 (9th Cir. 1978) (where search for evidence of marijuana possession exceeded the scope of the warrant in that evidence of cocaine possession was also sought and seized, all evidence was suppressed); *United States v. Rubalcava-Montoya*, 597 F.2d 140 (9th Cir. 1978) (testimony of illegal aliens who were discovered in illegal search conducted without probable cause or consent was suppressed as "fruit" of the illegal search, where government did not establish that the testimony was so attenuated from the illegal search as to be untainted).

93. See *United States v. Kennedy*, 573 F.2d 657 (9th Cir. 1978) (where probable cause for search warrant was established by questioning that occurred during "custodial interrogation" but without *Miranda* warnings, the evidence seized pursuant to the search warrant was the "fruit" of a *Miranda* violation, and must be suppressed). Cf. *Myers v. Rhay*, 577 F.2d 504, 508-09 (9th Cir.), cert. denied, 439 U.S. 968 (1978) (where state prisoner was afforded a full and fair state hearing at which to challenge confession as fruit of illegal arrest, habeas corpus was properly denied); *United States v. Schmidt*, 573 F.2d 1057, 1062-65 (9th Cir.), cert. denied, 439 U.S. 881 (1978) (subsequent confession to U.S. officials not fruit of coerced confession to Peruvian officials; physical evidence obtained prior to coerced confession could not be fruit of it).

94. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Cf. *United States v. Romero*, 585 F.2d 391, 395 (9th Cir. 1978) (court's determination that federal warrant was untainted was based on a finding that the warrant was in fact based on independent untainted information gathered prior to execution of illegal state warrant; "inevitable discovery" rule not applied).

95. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963). See *United States v. Ceccolini*, 435 U.S. 268 (1978) (less attenuation needed for live witness testimony to be admissible than for tangible evidence); *United States v. Rich*, 580 F.2d 929, 936-37 (9th Cir.), cert. denied, 439 U.S. 935 (1978) (taint of original illegal search dissipated so that defendant's subsequent admissions were admissible where there were: (1) repeated *Miranda* warnings, (2) lapse of one week between search and admissions, and (3) defendant initiated interview).

96. See *United States v. Rich*, 580 F.2d 929, 939 (9th Cir.), cert. denied, 439 U.S. 935 (1978) (no fourth amendment violation when evidence was discovered by innkeeper after defendant had abandoned motel room); *United States v. Walker*, 575 F.2d 209, 212 (9th Cir.), cert. denied, 439 U.S. 931 (1978) (no fourth amendment violation where co-owner of evidence consented to search); *United States v. Walker*, 569 F.2d 502-04 (9th Cir.), cert. denied, 435 U.S. 976 (1978) (no fourth amendment violation when airline employee conducted search prior to ruling that employees are thereby performing a federal function and that such searches must therefore be made in conformity with the fourth amendment).

In *United States v. Ceccolini*,⁹⁷ the Supreme Court distinguished between applying the "fruit of the poisonous tree" doctrine when the "fruit" is potentially tainted testimony as compared to tangible evidence.⁹⁸ In *Ceccolini*, a witness who was willing to testify about defendant's illegal gambling operations was discovered as a direct result of an illegal search. The Court held that the witness' testimony was admissible, even though it was the "fruit" of an illegal search. Reasoning that "the cost of excluding live-witness testimony often will be greater"⁹⁹ than the cost of excluding tangible evidence, the Court required "a closer, more direct link between the illegality and that kind of testimony."¹⁰⁰

Voluntary acts or admissions occurring after the illegal search or seizure can also provide the independent and lawful means necessary to admit evidence against a "fruit of the poisonous tree" argument.¹⁰¹ The determination of whether a subsequent confession is the "fruit" of a prior illegal confession depends on whether the second confession was made voluntarily.¹⁰² In *United States v. Schmidt*,¹⁰³ the Ninth Circuit denied petitioner's claim that admissions made to federal agents were the "fruits" of a prior coerced confession to Peruvian police. In so doing, it held the following factors to be determinative of the voluntariness of the subsequent confession: (1) petitioner had not lost his will to resist, as evidenced by signing a "forced signature" on his confession;¹⁰⁴

97. 435 U.S. 268 (1978).

98. *Id.* at 278.

99. *Id.*

100. *Id.* In its opinion, the Court stated that "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *Id.* at 280.

101. See *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979) (no violation where petitioners voluntarily went to INS office and made statements that were not induced by improper action of immigration officers); *United States v. Lopez*, 581 F.2d 1338, 1342-43 (9th Cir. 1978) (petitioner consented to search of vehicle's trunk after unlawful search); *United States v. Rich*, 580 F.2d 929, 936-37 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (although original search may have been illegal, statements made by defendant were admissible when: (1) defendant initiated the interview, (2) there were repeated *Miranda* warnings, and (3) there was a lapse of one week between the illegal search and defendant's admissions); *Hoon-silapa v. INS*, 575 F.2d 735, 738 (9th Cir.), *modified*, 586 F.2d 755 (9th Cir. 1978) (petitioner's wife and attorney, attempting to adjust his legal status, voluntarily submitted his visa petition, thereby rendering invalid the claim that visa petition was product of illegal arrest and search); *United States v. Brock*, 571 F.2d 480, 483 (9th Cir. 1978) (assuming initial search was illegal, petitioner's subsequent voluntary appearance and admissions to F.B.I. cured any defects in evidence).

102. *United States v. Schmidt*, 573 F.2d 1057 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978).

103. *Id.*

104. *Id.* at 1063.

(2) he admitted not fearing the federal agents;¹⁰⁵ and (3) he had taken at least one course in criminal law and was well aware of his *Miranda* rights.¹⁰⁶

The Ninth Circuit suppressed evidence solely on statutory grounds in *United States v. Santora*.¹⁰⁷ Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968,¹⁰⁸ courts may not authorize break-ins for the purpose of planting bugging devices. Therefore, a search warrant issued on the basis of information obtained through a wiretap initiated in violation of the Act and the incidental fruits of the warrant were suppressed.¹⁰⁹

C. Search Warrants and Probable Cause

The fourth amendment sets forth the conditions under which a warrant may issue.¹¹⁰ In applying these fourth amendment protections, the Supreme Court has articulated the requirements that must be met before a search warrant will pass constitutional muster. First, the affidavit presented to the magistrate in support of the warrant must allege facts sufficient to enable the magistrate to determine that probable cause for the search or arrest exists.¹¹¹ Second, the items to be seized and the place to be searched must be described with particularity, and in such a way as to indicate that criminal activity is likely to have occurred.¹¹² Third, the person issuing the warrant must be a neutral and detached magistrate, capable of determining whether probable cause for the requested arrest or search exists.¹¹³ The Court has stated that, in evaluating compliance with these requirements, the affidavit should be read as a whole, using a common sense approach.¹¹⁴

105. *Id.* at n.5.

106. *Id.* at n.6.

107. 583 F.2d 453 (9th Cir. 1978), *opinion vacated and remanded in light of* *Dalia v. United States*, 99 S. Ct. 1682 (1979), 99 S. Ct. 2155 (1979).

108. 18 U.S.C. §§ 2510-2520 (1976).

109. 583 F.2d at 468.

110. U.S. CONST. amend. IV. "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

111. *See, e.g., Spinelli v. United States*, 393 U.S. 410 (1969); *United States v. Ventresca*, 380 U.S. 102, 107-12 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964).

112. *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961); *Trupiano v. United States*, 334 U.S. 699, 710 (1948). *Cf. United States v. Moreno*, 569 F.2d 1049, 1053 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978) (only probability, not certainty, of finding described items at a particular location need be shown).

113. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

114. *United States v. Harris*, 403 U.S. 573, 577 (1971) (citing *United States v. Ventresca*,

1. Inferences and common knowledge

In *United States v. Fried*,¹¹⁵ the Ninth Circuit stressed that "great deference" is owed the decision of the magistrate who determines that probable cause exists.¹¹⁶ The magistrate is entitled to "infer" information to substantiate elements of the offense charged and to use "common knowledge" to support the conclusion in the affidavit that the evidence to be seized will have a nexus with the criminal activity charged. In *Fried*, for example, the court determined that the magistrate could infer that, because debentures were stolen in New York and because at least one was found in San Francisco, it was probable that the debentures had been transported in interstate commerce by one or more of the suspects. Furthermore, the magistrate could rely upon common knowledge that debentures are customarily traded in amounts of \$1,000 or more in order to find that some debentures were possessed in violation of a statute requiring that the property in question be worth more than \$5,000.¹¹⁷

In 1978, it was common for the Ninth Circuit to uphold findings of probable cause based upon inferences. In *United States v. Martinez*,¹¹⁸ the court upheld a search warrant for appellant's house. Although most of the information in the affidavit was based upon appellant's alleged gambling activities at a bar, appellant had received at least two telephone calls at his residence. During the calls, he was alleged to have given out wagering information. Therefore, it was permissible for the magistrate to infer that gambling records permitting appellant to answer telephone inquiries were kept at the house.¹¹⁹

380 U.S. 102, 108-09 (1965)); *United States v. Bowers*, 534 F.2d 186, 192 n.5 (9th Cir.), *cert. denied*, 429 U.S. 942 (1976).

115. 576 F.2d 787 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).

116. *Id.* at 791 (citing *Spinelli v. United States*, 393 U.S. 410, 419 (1969); *United States v. Bowers*, 534 F.2d 186, 188-89 (9th Cir.), *cert. denied*, 429 U.S. 942 (1976)).

117. 576 F.2d at 791.

118. 588 F.2d 1227 (9th Cir. 1978).

119. *Id.* at 1234. *See United States v. Radlick*, 581 F.2d 225, 229 (9th Cir. 1978) (court allowed magistrate to make appropriate inferences regarding the use of the chemical piperidine in the illicit manufacture of PCP); *United States v. Dubrofsky*, 581 F.2d 208, 212-13 (9th Cir. 1978) (court upheld issuance of warrant to search suspect's home in Boulder Creek after his arrest in Santa Cruz for importation of heroin, after court determined that it is a normal inference that heroin importers keep heroin and related paraphernalia at their homes); *United States v. Miroyan*, 577 F.2d 489, 494 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (court held it was reasonable to infer defendant had probably been carrying contraband and probably had it in his motel room). *See also United States v. Spearman*, 532 F.2d 132, 133 (9th Cir. 1976) (court held that a search warrant may be upheld when the nexus between the items to be seized and the place to be searched rests not upon direct observa-

*United States v. Solario*¹²⁰ is a rare example of a Ninth Circuit refusal to infer probable cause in 1978. In *Solario*, one of four search warrants had been issued. One of the four authorized a search of petitioner's parents' home in order to recover a revolver allegedly in the possession of petitioner's brother. Upon searching the home, the officers found an unregistered semi-automatic rifle that petitioner admitted was his. On appeal, the court granted the motion to suppress. The only factors supporting the warrant were that a reliable informant (1) had seen petitioner's brother with a revolver between four and one-half and sixteen and one-half months ago, (2) had heard the brother say he owned several handguns, (3) had seen the brother with a handgun in the parents' home three times during 1976, and (4) had bought narcotics from the brother, with some of the purchases occurring in the parent's home. The court concluded that the primary information was stale and the rest of the information was insufficient to cure the staleness.¹²¹

2. Information from informants and co-conspirators

Where the inference of probable cause is to be drawn solely from information furnished by an unnamed informant rather than from direct observation of the affiant, the reliability of the informant and his information must be established. In *Aguilar v. Texas*¹²² and *Spinelli v. United States*,¹²³ the Supreme Court set forth a two-pronged test which requires (1) that the affidavit set forth the underlying circumstances necessary to enable the magistrate to evaluate independently the informant's conclusions,¹²⁴ and (2) that the affidavit contain sufficient facts to enable the magistrate to conclude that the unnamed informant is credible or that his information is reliable.¹²⁵

The Ninth Circuit recently applied this test in *United States v. McCrea*,¹²⁶ which involved the sighting of what appeared to be parts of a machine gun by two social workers who were visiting the home of a

tion, but upon the combination of the type of crime, the nature of items sought, and normal inferences regarding the places where a criminal would hide contraband).

120. 577 F.2d 554 (9th Cir. 1978).

121. *Id.* at 555-56. See *United States v. Sherwin*, 572 F.2d 196, 198 (9th Cir. 1977), *cert. denied*, 437 U.S. 909 (1978) (to determine if affidavit is sufficient to support a warrant the magistrate must look only to the information on the face of the document).

122. 378 U.S. 108 (1964).

123. 393 U.S. 410 (1969).

124. *Id.* at 413.

125. *Id.*

126. 583 F.2d 1083 (9th Cir. 1978) (*per curiam*).

welfare recipient. The welfare recipient, the former wife of appellant, told them her husband stored his guns in the basement and was going to Montana soon on a shooting spree. On the basis of this information, an agent of the Bureau of Alcohol, Tobacco, and Firearms obtained a warrant to search the home. Appellant argued that the affidavit was insufficient under *Aguilar* because the social workers were "not credible and reliable informants," for they lacked knowledge about firearms.¹²⁷ Their conclusions about the machine gun were said to be "mere beliefs or suspicions and insufficient to constitute probable cause."¹²⁸ The court distinguished *Aguilar*,¹²⁹ stating that "[t]hese were not professional informants, but known private citizens giving good faith observations upon which it was reasonable to rely."¹³⁰ Thus, there was probable cause for the issuance of the warrant.¹³¹

In *United States v. Moreno*,¹³² the court, relying upon its previous statements in *United States v. Smith*,¹³³ held that information provided by a co-conspirator who was under arrest and whose reliability had not been proven could still be a basis for probable cause when that information was detailed and corroborated by observation.¹³⁴ In *Moreno*, the informant's statements concerning the appearance and behavior of his heroin "connection" were corroborated by agents who monitored a telephone call between the informant and his "connection," and who subsequently observed a "buy." The court held that the *Aguilar-Spinelli* test had been satisfied because the affidavit in support of the warrant to search the "connection's" residence set out the informant's statements, the agent's corroborating observations, and the statements of an agent whose experience in investigating narcotics led him to conclude that more heroin would be found at the residence.¹³⁵

Finally, it is well established in the Ninth Circuit that the second prong of the *Aguilar-Spinelli* test "can . . . be met by circumstantial

127. *Id.* at 1085.

128. *Id.*

129. In *Aguilar*, the unidentified informant was not shown to have spoken on the basis of personal knowledge or to have relied upon specific facts or circumstances. 378 U.S. at 113-14.

130. 583 F.2d at 1085.

131. See *Rutherford v. Cupp*, 508 F.2d 122, 123 (9th Cir. 1974), *cert. denied*, 421 U.S. 933 (1975) (*per curiam*) (informant was a neighbor of defendant and had no apparent ulterior motive).

132. 569 F.2d 1049 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978).

133. 503 F.2d 1037 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975).

134. 569 F.2d at 1051.

135. *Id.* at 1052.

evidence on the trustworthiness of the tip."¹³⁶ When fear for their safety required that informants' names be withheld, the court, in *United States v. Louderman*,¹³⁷ upheld the validity of a search warrant based on two factors: (1) the informants' reliability was demonstrated by their history of supplying informative leads that had resulted in numerous arrests, and (2) the information they supplied was corroborated through various means of investigation.¹³⁸

3. Items and premises described with particularity

As a "fundamental protection . . . intended to prevent general searches,"¹³⁹ an affidavit must particularly describe the items to be seized and the premises to be searched.¹⁴⁰ While a warrant's description of the items to be seized may be sufficiently specific to withstand a claim of overbreadth, the actual execution of the warrant may not. The execution may fail for technical reasons¹⁴¹ or because the search exceeded the scope authorized by the warrant.¹⁴²

136. *United States v. Garrett*, 565 F.2d 1065, 1070 (9th Cir. 1977), *cert. denied*, 435 U.S. 974 (1978) (citing *United States v. Harris*, 403 U.S. 573 (1971) & *Draper v. United States*, 358 U.S. 307 (1959)).

137. 576 F.2d 1383 (9th Cir. 1978).

138. *Id.* at 1389 (The F.B.I. was advised that the telephone company, through the use of a pen register, had obtained evidence of wire fraud; "corroboration through various means of independent investigation" consisted of the subpoenaed results of the pen register investigation.). *See also United States v. Fried*, 576 F.2d 787, 791 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) (where affidavit was based largely on statement of informant who saw and handled stolen debenture in hotel room and subsequently delivered it to agent, reliability of informant could be inferred from informant's detailed description of criminal activity).

139. *United States v. Dubrofsky*, 581 F.2d 208, 213 (9th Cir. 1978). *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) ("the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings"). *Cf. United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (when agents concealed from issuing magistrate the scope of their intended search and used warrant for general exploratory search, all evidence was suppressed).

140. U.S. CONST. amend. IV. *See United States v. Louderman*, 573 F.2d 1383 (9th Cir. 1978) (court held that the items described were sufficiently related to the investigation of wire fraud).

141. *See, e.g., FED. R. CRIM. P. 41(c) (1)*, which provides in part: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." "Daytime" is defined as "the hours from 6:00 a.m. to 10:00 p.m. according to local time." *FED. R. CRIM. P. 41(h)*. *Cf. United States v. Kim*, 577 F.2d 473 (9th Cir. 1978) (although the record indicated a dispute as to five minute period, warrant was not prematurely executed).

142. *See, e.g., United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (court found agents intentionally exceeded scope of warrant authorizing search for marijuana). *But see, e.g., United States v. McCrea*, 583 F.2d 1083, 1085-86 (9th Cir. 1978) (*per curiam*) (court upheld seizure of pipe bomb as within the scope of warrant directing search for machine gun and parts).

In *United States v. Dubrofsky*,¹⁴³ an agent was informed by telephone that a warrant had been issued, but the caller did not disclose to him the identity of the specific items authorized to be seized. The court upheld the execution of the warrant only on the "peculiar facts" of the case. These facts included the agent's testimony that he had participated in at least ten searches of a similar nature and had assumed that the warrant authorized no greater or lesser search than he had routinely conducted in the other cases.¹⁴⁴ Relying primarily on hindsight, the court found that appellant's rights had not been jeopardized and, consequently, the execution of the warrant could be upheld.

4. Misrepresentations and omissions

In the area of particularity, the court must also determine whether misrepresentations or omissions in the affidavit render it insufficient under fourth amendment standards. The Supreme Court in *Franks v. Delaware*¹⁴⁵ recently held that, in order to obtain a hearing on the veracity of an affiant, the challenger must allege that any omissions or misrepresentations were made recklessly or with intent to deceive the court.¹⁴⁶ Even when sufficient allegations have been made, if the allegedly false portions of the affidavit are set aside and, without them, the affidavit remains sufficient, no hearing will be permitted.¹⁴⁷ Only when the sufficiency of the affidavit depends upon the allegedly reckless or deliberate misstatements will a hearing be granted.¹⁴⁸ An affidavit containing omissions or misstatements resulting from negligence, but which otherwise establishes probable cause, will be sufficient to support the warrant.¹⁴⁹

In *United States v. Rettig*,¹⁵⁰ the Ninth Circuit was confronted with a bad faith omission that, unlike that in *Franks*, did not undercut the factual sufficiency of the affidavit but, rather, operated to deprive the magistrate of the ability to properly supervise the scope of the search.¹⁵¹ On April 2, 1975, agents of the Drug Enforcement Agency

143. 581 F.2d 208 (9th Cir. 1978).

144. *Id.* at 213.

145. 438 U.S. 154 (1978).

146. The allegations may not be merely conclusory; they must be fully supported. *Id.* at 171.

147. *Id.* at 171-72.

148. *Id.* at 172.

149. *Id.* at 171.

150. 589 F.2d 418 (9th Cir. 1978).

151. *Id.* at 423. *Cf.* *United States v. Romero*, 585 F.2d 391 (9th Cir. 1978) (government's failure to inform federal magistrate that evidence sought under federal warrant had been suppressed by state court did not impair magistrate's finding of probable cause); *United*

had sought an arrest warrant for defendant Rettig and a warrant to search his home from a federal magistrate. The agents alleged many details of a complicated conspiracy to import cocaine. Although the magistrate issued the arrest warrant, he declined to issue the search warrant because he found that the information in support was stale. The next day, Rettig was arrested in his home while attempting to destroy approximately one pound of marijuana. Following the arrest, a new search warrant was sought, this time from a state court magistrate. The affidavit purported simply to seek evidence linked to marijuana. No intention to search for evidence of cocaine importation was revealed, and the affidavit contained no mention of the federal court's denial of a warrant on the previous day. The state magistrate granted the warrant. The ensuing search was calculated to seek evidence relating to the cocaine conspiracy. Although the issuing magistrate had authorized a search for personal papers indicating occupancy of the premises, the quantity and nature of the personal papers and effects seized clearly exceeded the limited objectives stated in the warrant.¹⁵²

The court found that, while the basis for the warrant to search for marijuana was sufficient, the actual search exceeded the scope of the warrant.¹⁵³ The determination of whether the scope of a search exceeds the warrant's authorization was said to rest upon both the purpose disclosed to the magistrate for the issuance of the warrant and the manner of the execution of the search.¹⁵⁴ In *Rettig*, the court found it impossible to determine which of the items actually seized would have been discovered had the search not exceeded the scope of the warrant. Therefore, all items seized were suppressed.¹⁵⁵

In finding that the agents had deliberately concealed facts from the issuing magistrate, the court stated:

States v. Miroyan, 577 F.2d 489, 494 & n.2 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (although illegal entry and improper observation formed the basis for part of the affidavit, the remaining facts were sufficient to support issuance of the warrant); United States v. Walker, 575 F.2d 209, 213 & n.3 (9th Cir.), *cert. denied*, 439 U.S. 931 (1978) (inaccurate statement that items sought to be seized were stolen was not intentional, negligent, or material).

152. 589 F.2d at 423.

153. *Id.*

154. *Id.*; *VonderAhe v. Howland*, 508 F.2d 364, 369 (9th Cir. 1975). *Cf.* *United States v. Dubrofsky*, 581 F.2d 208 (9th Cir. 1978) (where agent was ignorant of warrant's limitations, but conducted search reasonably and in apparent good faith, exceeding warrant's scope was not fatal).

155. 589 F.2d at 423. Although it is permissible to seize items not described in the warrant, the search must have been confined to the terms of the warrant and must have been conducted in good faith. *Id.*

A judicial officer cannot perform the function of issuing a warrant particularly describing the places to be searched and the things to be seized, and of supervising the proper return of such process, where the police fail to disclose an intent to conduct a search the purposes and dimensions of which are beyond that set forth in the affidavits.¹⁵⁶

D. *Electronic Surveillance*

Soon after the Supreme Court's decision in *Katz v. United States*,¹⁵⁷ Congress enacted the Omnibus Crime Control and Safe Streets Act.¹⁵⁸ The legislative history of the Act indicates that Congress intended *Katz* to serve as a guide to courts in determining when a person has a justifiable expectation of privacy in his communications under the Act.¹⁵⁹ Title III of the Act prohibits the interception¹⁶⁰ of wire or oral communications, except within narrowly defined circumstances.¹⁶¹

In *United States v. McIntyre*,¹⁶² the issues revolved around the prosecution of a former chief of police who had "bugged" the office of his assistant chief of police in violation of Title III of the Crime Control Act. Applying an analysis based upon the *Katz* approach, the Ninth Circuit held that the assistant chief of police had a reasonable expectation that conversations in his office would not be overheard.¹⁶³ Furthermore, the *McIntyre* court held that, because the bugging involved in that case was part of a criminal investigation, rather than part of an internal affairs investigation, Title III controlled.¹⁶⁴

Title III prohibits only the "willful" interception of communica-

156. *Id.*

157. 389 U.S. 347 (1967).

158. Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520 (1976) [hereinafter cited as Crime Control Act].

159. S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2178.

160. The concept of interception is defined in the Crime Control Act § 2510(4) as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

161. See Crime Control Act § 2511(2), *supra* note 158.

162. 582 F.2d 1221 (9th Cir. 1978).

163. *Cf. United States v. Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975) (under certain circumstances, employer may search employee's work area for lost property or to supervise work); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (employee's reasonable expectation of privacy may be diminished by established regulatory scheme or specific office practice).

164. The court noted that Title III of the Crime Control Act was particularly written to apply to criminal investigations. 582 F.2d at 1224. *Cf. United States v. Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975) (holding that some searches of employees by employers in a noncriminal context are justifiable).

tions.¹⁶⁵ In *McIntyre*, the defendants contended that their bugging of the office of an assistant chief of police was not "willful" within the meaning of the statute because they had a good faith belief that their conduct was legitimate. The court of appeals acknowledged that the meaning of willful had not been uniformly applied in federal criminal statutes and that an examination of each statute was necessary to determine the legislative intent in the use of the word. Relying on *United States v. Murdock*,¹⁶⁶ the court interpreted a willful act as one done with a "bad purpose" or "evil motive." Consequently, the officers' belief that their conduct was legal was merely a defense of ignorance of the law.¹⁶⁷ The court held that a police officer acts with "bad purpose" and, hence, willfully under Title III, when he "engages in electronic surveillance (1) without a court order, and (2) in the absence of the kind of emergency described in 18 U.S.C. § 2518(7)."¹⁶⁸ Because the defendants in *McIntyre* had failed to obtain a court order or to establish the existence of an emergency, their act was "willful" under Title III.

Under the Crime Control Act, authorized wiretaps are permitted,¹⁶⁹ but applications for such authorization must comply with the standards of specificity and necessity enumerated in the Act.¹⁷⁰ While the Act sets forth the standard to be used,¹⁷¹ interpretations have varied.¹⁷² In *United States v. Spagnuolo*,¹⁷³ the Ninth Circuit enunciated guidelines by which to judge the sufficiency of affidavits submitted to support applications for wiretaps. "[T]he affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures

165. Crime Control Act § 2511(1)(a)-(b), *supra* note 158.

166. 290 U.S. 389 (1933). See S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in [1968] U. S. CODE CONG. & AD. NEWS 2112, 2181 (citing *Murdock*).

167. 582 F.2d at 1224-25.

168. *Id.* at 1225.

169. Crime Control Act § 2517, *supra* note 158.

170. *Id.* § 2518.

171. The Crime Control Act § 2518, *supra* note 158, states in pertinent part:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication . . . shall include the following information

. . . .

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous

172. Compare *United States v. Kalustian*, 529 F.2d 585 (9th Cir. 1975) with *United States v. Kerrigan*, 514 F.2d 35 (9th Cir.), cert. denied, 423 U.S. 924 (1975).

173. 549 F.2d 705 (9th Cir. 1977) (affidavit sufficient where it included account of nine month investigation, infiltration, and F.B.I. surveillance of gambling organization, even though government unable to identify all participants).

have failed or will fail in the particular case at hand.”¹⁷⁴ This entails finding that the affidavit reveals a good faith effort made to identify those violating the law, and that the affidavit shows that normal investigative techniques, employed for a reasonable period of time, have failed to build the case.¹⁷⁵ Moreover, any showing that the employment of normal investigatory techniques would be either too dangerous or unlikely to succeed must meet only a slight standard of reasonableness with regard to the factual history of the investigation.¹⁷⁶

Pursuant to the *Spagnuolo* analysis, the Ninth Circuit recently upheld the sufficiency of affidavits in *United States v. Kim*.¹⁷⁷ In *Kim*, the court found the affidavits sufficient when it was shown that the Hawaiian police had conducted a four month investigation into gambling operations revealing the use of a central telephone location, that the location had been moved three times, and that alternatives to wiretapping had been tried to no avail. The court stated that, while the Government must show more than mere difficulty in solving a case,¹⁷⁸ the procedures used need not have been a complete failure. It must only be shown that the effectiveness of the methods used has been exhausted.¹⁷⁹

The Ninth Circuit has also used the *Spagnuolo* standards of reasonableness in determining compliance with the minimization requirements of section 2518(5) of the Crime Control Act.¹⁸⁰ In *Kim*, the defendant argued that there had been a violation of the minimization standards in that the wiretap had intercepted a casual conversation about bridge.

174. *Id.* at 710.

175. *Id.*

176. *Id.* at 710-11.

177. 577 F.2d 473 (9th Cir. 1978).

178. *Id.* at 477 (citing *United States v. Kalustian*, 529 F.2d 585, 589 (9th Cir. 1975)).

179. *Id.* at 477 (citing *United States v. Spagnuolo*, 549 F.2d 705, 710 (9th Cir. 1977)). See *United States v. Martinez*, 571 F.2d 589 (9th Cir. 1978) (No. 77-2643; unpublished opinion) (affidavits sufficient when six month investigation and infiltration of gambling ring by F.B.I. failed to disclose names of suspects outside Los Angeles area, and when only remaining investigative step would have been grant of immunity to major participant). Cf. *United States v. Santora*, 583 F.2d 453 (9th Cir. 1978), *opinion vacated in light of Dalia v. United States*, 99 S. Ct. 1682 (1979), 99 S. Ct. 2155 (1979) (where affidavit was sufficient to support initial intercept order relating to certain suspects, “incorporation by reference” of statements in first affidavit into request for second wiretap failed to show how investigative techniques had not succeeded with regard to second group of suspects).

180. The Crime Control Act § 2518(5), *supra* note 158, states in part:

No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. . . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, [and] shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter

The court held, however, that because the bridge conversation included a discussion of bet cancellations, the interception did not violate the minimization requirements of the Act.¹⁸¹

Section 2515 of the Crime Control Act codifies the "fruit of the poisonous tree" doctrine in the area of electronic surveillance. That section requires exclusion of the content of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter."¹⁸² In *United States v. Santora*,¹⁸³ the Ninth Circuit confronted an issue that has sharply divided the circuits: whether Title III of the Crime Control Act empowers district courts to authorize break-ins for the purpose of installing listening devices¹⁸⁴ and, hence, whether evidence thus acquired would be fruit of the poisonous tree. Title III, itself, contains no provision empowering courts to authorize break-ins. While the *Santora* court agreed with several circuits that Congress was aware of the entry problem involved in planting a bugging device, it was unwilling to assume that Congress "chose to grant authority to permit either break-ins or technical trespasses to install bugging devices by implications derived from its silence."¹⁸⁵ Consequently, the court held that neither

181. 577 F.2d at 483. *See also* *United States v. Abascal*, 564 F.2d 821, 827 (9th Cir.), *cert. denied*, 435 U.S. 942 (1977) (officers must limit interference with communication outside scope of wiretap order; once pattern of innocent calls develops, recording of such calls should terminate).

182. Crime Control Act § 2515, *supra* note 158. *See* *United States v. Donovan*, 429 U.S. 413 (1977) (suppression of evidence not warranted where law enforcement officials failed to comply with identification and notice requirements but had satisfied all other requirements of Act). *Cf.* *United States v. Spagnuolo*, 549 F.2d 705 (9th Cir. 1977) (suppression required where conversations intercepted under invalid wiretap formed essence of probable cause in affidavits for two subsequent affidavits).

183. 583 F.2d 453 (9th Cir. 1978), *opinion vacated and remanded in light of* *Dalia v. United States*, 99 S. Ct. 1682 (1979), 99 S. Ct. 2155 (1979).

184. The Second and Third Circuits have held that Title III implicitly authorizes break-ins without specific judicial approval. *United States v. Scafidi*, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 2231 (1978); *United States v. Dalia*, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 99 S. Ct. 1682 (1979). *See* discussion of *Dalia* at text accompanying note 187 *infra*. The Fourth Circuit has held that Title III implicitly authorizes break-ins, but only with judicial approval. *Application of United States*, 563 F.2d 637 (4th Cir. 1977). The Eighth Circuit, while not finding implicit authority in Title III, has upheld judicially approved break-ins on a different theory. *United States v. Agrusa*, 541 F.2d 690 (8th Cir.), *cert. denied*, 429 U.S. 1045 (1976) (exigent circumstances permitted break-in where requirement that an announcement precede the entry would warn suspect to avoid making incriminating statements). The Sixth Circuit has held that neither Title III nor any other statute empowers courts to authorize break-ins. *United States v. Finazzo*, 583 F.2d 837 (6th Cir. 1978). The District of Columbia Circuit has held that there is no implicit authority in Title III to order break-ins. *United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 833 (1978).

185. 583 F.2d at 461.

Title III nor any other statute empowers district courts to authorize break-ins to plant bugging devices. Therefore, under *Santora*, the evidence obtained via a court-authorized break-in must be excluded.¹⁸⁶

However, a 1979 Supreme Court decision, *Dalia v. United States*,¹⁸⁷ has come to a contrary conclusion. In *Dalia*, the Court held that neither the fourth amendment nor the Crime Control Act precludes the use of covert entry for the installation of eavesdropping devices.

In *United States v. Louderman*,¹⁸⁸ the court reiterated the principles of *Hodge v. Mountain States Telephone & Telegraph Company*¹⁸⁹ by holding that it would continue to recognize a distinction between a pen register, which merely records the numbers dialed, and a bugging, which intrudes upon the content of the communication.¹⁹⁰ In *Louderman*, the court found no fourth amendment violation in the use of a pen register by a telephone company, especially when the company's intrusion was unaccompanied by governmental participation.¹⁹¹

E. Warrantless Searches

1. Search incident to arrest

Law enforcement officers may conduct limited searches incident to lawful arrests¹⁹² in order to prevent the destruction of evidence and to

186. *Id.* at 465. The court specifically noted that Congress had relied upon *Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967). *Berger* struck down a New York surveillance statute which permitted seizure of conversations without sufficiently narrow warrant procedures. Implicit in *Berger* was a holding that the fourth amendment protects conversations without regard to physical trespasses. *Katz*, decided six months later, expressly held that fourth amendment protections extend to conversations in which a person has a reasonable expectation of privacy.

187. 99 S. Ct. 1682 (1979).

188. 576 F.2d 1383 (9th Cir. 1978).

189. 555 F.2d 254, 256-57 (9th Cir. 1977).

190. 576 F.2d at 1389.

191. See *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254 (9th Cir. 1977); *United States v. Goldstein*, 532 F.2d 1305, 1312 (9th Cir.), *cert. denied*, 429 U.S. 960 (1976) ("the right of privacy protected by the wiretap statutes goes to the message content rather than the fact that a call was placed"). Cf. *United States v. Jernigan*, 582 F.2d 1211 (9th Cir.), *cert. denied*, 439 U.S. 991 (1978) (consent to monitoring of phone call by one party without the knowledge of the other not a violation of fourth amendment rights).

When electronic beepers, trackers, or transponders do little more than aid visual surveillance, no fourth amendment issue is presented. See, e.g., *United States v. Dubrofsky*, 581 F.2d 208 (9th Cir. 1978); *United States v. Miroyan*, 577 F.2d 489 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978).

192. E.g., *United States v. Robinson*, 414 U.S. 218, 224 (1973) (after arrest for driving without a license, limited patdown search of arrestee's person upheld) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."). In *Cupp v. Murphy*, 412 U.S. 291 (1973), the Court employed

ensure the safety of arresting officers.¹⁹³ Such searches will be upheld even though no evidence is in fact found and even though the officer does not actually fear for his safety.¹⁹⁴

The permissible scope of incidental searches is limited to the arrestee's person and the area within his immediate control.¹⁹⁵ This area has been described by the Supreme Court as encompassing "the area from within which . . . [an arrestee] might gain possession of a weapon or destructible evidence."¹⁹⁶ The Ninth Circuit interpreted this language broadly in 1978, sustaining the search of a purse found lying on the front seat of an arrestee's vehicle after the arrestee had been removed from the auto and placed in custody.¹⁹⁷

Searches are considered to be incident to arrest provided they are "substantially contemporaneous" with the arrest.¹⁹⁸ In *United States v. Chadwick*,¹⁹⁹ however, the Supreme Court distinguished two situations in which a search may involve "personal property. . . immediately as-

the incidental search rationale to justify a limited search even though the suspect was merely "detained" and not under actual arrest. While noting that a full search would not have been justified, the Court nonetheless held that "[l]imited searches of defendant's person, conducted incident to a stationhouse detention, with probable cause, and in the face of the ready destructibility of evidence [are] valid under the principle of *Chimel v. California*." *Id.* at 295-96.

193. *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (search of locked footlocker conducted more than one hour after arrest of owner held not to be incident to arrest); *United States v. Robinson*, 414 U.S. 218, 234 (1973) (search of defendant's person immediately after his arrest for a traffic offense was incident thereto).

194. *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the petitioner or that he did not himself suspect that the petitioner was armed."); *United States v. Robinson*, 414 U.S. 218, 235 (1973).

195. *Chimel v. California*, 395 U.S. 752, 763 (1969).

196. *Id.* See *United States v. Dixon*, 558 F.2d 919, 922 (9th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978) (search and seizure of bag containing heroin, found on car floor after defendant had left auto and while he was being handcuffed, held valid as incident to arrest); *United States v. Gonzales-Rodriguez*, 513 F.2d 928, 931-32 (9th Cir. 1975) (search of camper for weapons held valid even though only way driver could have retrieved weapon from its hiding place was to get out of drivers seat, open door of camper and enter vehicle); *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974) (search of defendant's home after his arrest in front yard held not incident to arrest).

197. *United States v. Moreno*, 569 F.2d 1049 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978).

198. *United States v. Chatman*, 573 F.2d 565, 567 (9th Cir. 1977) (*per curiam*) (search of defendant's pants prior to arrest for narcotics possession valid as "substantially contemporaneous with the arrest"); *United States v. See*, 505 F.2d 845, 855 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (search of defendant's person and auto conducted before actual arrest but at a time when he was "not free to leave" held incident to arrest); *United States v. Murray*, 492 F.2d 178, 188-89 (9th Cir. 1973), *cert. denied*, 419 U.S. 942 (1974) (search of garment bag being carried by defendant which took place before formal arrest held valid because officer had probable cause to detain suspect).

199. 433 U.S. 1 (1977).

sociated with the person of the arrestee.”²⁰⁰ If the search involves any other type of property, and if the arresting officers have taken exclusive control of such property, then the search will not be upheld as incident to arrest.²⁰¹ A more lenient standard, however, is applied to searches of the arrestee himself and to searches of property immediately associated with him.²⁰² In *United States v. Oaxaca*,²⁰³ for example, the arrestee’s shoes were seized while he was in custody, six weeks after his arrest. The Ninth Circuit attached “no great significance” to the fact that the delay was so much longer than the ten hour delay in *United States v. Edwards*²⁰⁴ and concluded that it would have been a “useless and meaningless formality” to require a warrant.²⁰⁵

2. Emergency or exigent circumstances

The validity of a warrantless entry on private property²⁰⁶ is recognized if immediate action is necessary to preserve evidence,²⁰⁷ to pro-

200. *Id.* at 15. The Court in *Chadwick* struck down the stationhouse search of a locked footlocker originally seized from the open trunk of defendant’s vehicle following his arrest.

201. *Id.*

202. See generally *United States v. Edwards*, 415 U.S. 800, 805 (1974) (seizure of defendant’s shirt and pants ten hours after arrest held valid) (the seizure was “no more than taking from respondent the effects in his *immediate possession* that constituted evidence of crime” (emphasis added)).

203. 569 F.2d 518 (9th Cir.), *cert. denied*, 439 U.S. 926 (1978).

204. 415 U.S. 800 (1974).

205. 569 F.2d at 524. See *United States v. Collom*, No. 77-1040 (9th Cir. June 15, 1978) (search of arrestee’s wallet upheld as incidental although it took place at stationhouse “some time” following arrest).

206. In *Johnson v. United States*, 333 U.S. 10, 14 (1948), the Court underscored the importance of the warrant requirement in protecting property owners’ reasonable expectations of privacy: “The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.” *Id.* at 14. Cf. *Michigan v. Tyler*, 436 U.S. 499, 505 (1978) (innocent fire victim still has reasonable expectation of privacy in whatever remains of his property); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (“The basic purpose of [the fourth amendment] . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.”).

207. *Cupp v. Murphy*, 412 U.S. 291 (1973). In *Cupp*, the police took fingernail scrapings from a person without a warrant. The Court upheld this action because of “the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the *ready destructibility of the evidence*.” *Id.* at 296 (emphasis added). See *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (discovery of murder did not, by itself, create an exigent circumstance because “[t]here was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant.”); *United States v. Santana*, 427 U.S. 38, 43 (1976) (warrantless entry into house reasonable because once defendant saw the police there was “a realistic expectation that any delay would result in destruction of the evidence.”); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (warrantless taking of blood sample upheld where delay necessary to obtain a warrant threatened the destruction of the evidence).

tect law enforcement officers or third persons,²⁰⁸ or to prevent the escape of suspects.²⁰⁹ Exigencies sufficient to justify warrantless action generally occur whenever the "inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action" by the authorities.²¹⁰ The trial court's findings in this area will not be disturbed unless "clearly erroneous."²¹¹

The Supreme Court in 1978 decided two cases concerning exigent circumstances. In the first of these cases, *Michigan v. Tyler*,²¹² investigators collected evidence from the scene of a fire immediately after the fire was extinguished. Three weeks later the inspectors returned to obtain additional evidence. In upholding the initial entries and striking down those that occurred weeks later, the Court observed that "[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable',"²¹³ but "once in the build-

208. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) ("[W]hen the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if . . . a killer is still on the premises.") ("The need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal absent an exigency or emergency.") (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963) (opinion of Burger, J.)); *United States v. Flickinger*, 573 F.2d 1349, 1355 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978) ("Where the crime on which arrest is based is a crime of violence . . . the increased danger to the community and to the arresting officers justifies the avoidance of delay involved in obtaining a warrant."); *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976) ("[T]o delay the entry until the warrant was obtained . . . increased the likelihood that innocent persons would be harmed . . ."); *United States v. Hobson*, 519 F.2d 765, 776 (9th Cir.), *cert. denied*, 423 U.S. 931 (1975) (warrantless search of house upheld where some weapons in plain view and house is reported to contain people "who know how to use [the weapons] and have expressed an intent to do so.").

209. *United States v. Flickinger*, 573 F.2d 1349, 1355 (9th Cir. 1978), *cert. denied*, 439 U.S. 836 (1979) ("[i]n some cases we have treated the suspect's knowledge that he is at risk of immediate apprehension as an exigent circumstance justifying immediate action."); *United States v. Valentin*, 569 F.2d 1069, 1071 (9th Cir. 1978) (warrantless entry into house reasonable because "it was likely that the occupant might attempt to escape."). *Cf.* *Johnson v. United States*, 333 U.S. 10, 15 (1948) (exigent circumstances not present because "[n]o suspect was fleeing or likely to take flight").

210. *United States v. Flickinger*, 573 F.2d 1349, 1355 (9th Cir. 1978), *cert. denied*, 439 U.S. 836 (1979). *See* *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973) ("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation . . ."). The balancing test referred to in the text must be decided on the basis of the totality of circumstances. *United States v. Flickinger*, 573 F.2d at 1354. *See, e.g., Michigan v. Tyler*, 436 U.S. at 509 ("A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable'").

211. *United States v. Flickinger*, 573 F.2d 1349, 1356-57 (9th Cir. 1978), *cert. denied*, 439 U.S. 836 (1979).

212. 436 U.S. 499 (1978).

213. *Id.* at 509.

ing, [officials] may [only] remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches."²¹⁴ In *Mincey v. Arizona*,²¹⁵ however, the Court declined to hold that the discovery of a homicide creates circumstances sufficiently demanding to allow police investigators to enter and search the scene of the crime, beyond an immediate search for victims, without a warrant.²¹⁶

The courts have noted that one alternative to a warrantless dwelling search is to post a guard nearby until a warrant can be obtained.²¹⁷ In *United States v. Flickinger*,²¹⁸ the Ninth Circuit explicitly recognized this possibility, although cautioning that "[s]uch measures, while appropriate in some cases, may carry their own unacceptable dangers, i.e., a heightened risk of weapons play and danger to third parties."²¹⁹

"Hot pursuit" is a recognized exigency wherein a police officer in the process of apprehending a suspect may lawfully enter premises without a warrant, when delay might result in destruction of evidence or danger to the officer.²²⁰ In *United States v. Oaxaca*²²¹ a hot pursuit entry into a

214. *Id.* at 511. The Court based its decision on findings that [p]rompt determination of the fire's origin may be necessary to prevent its recurrence Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims.

Id. at 510.

215. 437 U.S. 385 (1978).

216. *Id.* at 394.

217. *E.g., id.* (police guard at apartment minimized possibility of evidence being lost, destroyed or removed during time required to obtain search warrant); *United States v. Santana*, 427 U.S. 38, 44-45 (1976) ("[t]he failure to seek a warrant was harmless because it would have been proper to keep the Santana residence under surveillance while the warrant was being sought") (Stevens, J., concurring). *Cf.* *United States v. Curran*, 498 F.2d 30, 35 (9th Cir. 1974) (agents had house surrounded and could have kept it this way until a warrant was obtained, "but such a siege would not have been reasonable or adequate").

218. 573 F.2d 1349 (9th Cir. 1978), *cert. denied*, 439 U.S. 836 (1979).

219. *Id.* at 1356. *See also* *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir. 1975) (in rejecting a police guard requirement the court must consider "the legitimate interests of the neighbors whose surroundings should not be impressed with a state of siege, [and] innocent persons who might be injured accidentally as a consequence of a large number of armed and mobile men").

220. *United States v. Santana*, 427 U.S. 38, 43 (1976) (suspect standing in doorway ran inside house to avoid arrest) ("[A] suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place"); *Warden v. Hayden*, 387 U.S. 294 (1967) (delay in pursuit of armed felon and delay in search of premises where felon located unnecessary, where to do so would gravely endanger lives of officers or others).

221. 569 F.2d 518 (9th Cir.), *cert. denied*, 439 U.S. 926 (1978).

garage was upheld because police officers believed an armed robbery suspect was inside and heard a "very loud noise" coming from inside.²²²

3. Investigative detention

In *Terry v. Ohio*²²³ the Supreme Court held that law enforcement officers may detain a person without a warrant, probable cause or consent if the officers have a reasonable suspicion²²⁴ "that criminal activity is afoot."²²⁵ An investigatory stop is deemed to have occurred "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."²²⁶

222. *Id.* at 521-22. See also *Warden v. Hayden*, 387 U.S. 294 (1967) ("The police were informed that an armed robbery had taken place, and that the suspect had entered [a certain house] less than five minutes before they reached it. They acted reasonably when they entered the house and began to search . . .").

223. 392 U.S. 1 (1968) (stop and frisk of persons who appeared to be planning a robbery upheld).

224. "Reasonable suspicion" required that "the police officer . . . point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The facts need not provide "probable cause" to believe the suspect guilty of a crime. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975).

"Reasonable suspicion" and "founded suspicion" are indistinguishable standards. *United States v. Contreras-Diaz*, 575 F.2d 740, 744 (9th Cir.), *cert. denied*, 439 U.S. 855 (1978); *United States v. Collom*, No. 77-1040, slip op. at 1866 n.4.

225. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968). See, e.g., *United States v. Espinoza*, 578 F.2d 224 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 849 (1978) (2:15 a.m. stop of truck reasonable after driver left van at gas station and joined accomplices in truck); *United States v. Walker*, 576 F.2d 253 (9th Cir. 1978) (per curiam) (reasonable stop of arrestee's companion; she did not respond to "stop" command, hid large bag in bushes, and reached into purse); *United States v. Collom*, No. 77-1040, slip op. at 1866 (9th Cir. June 15, 1978) (investigatory stop appropriate; officers, directed to scene of possible burglary, saw suspects stooping down at rear of car, then retreating quickly when officers approached).

In balancing the need for intrusion against the degree of inconvenience, the Ninth Circuit determines reasonableness by looking at all the circumstances. Some of the factors considered are:

"[t]he seriousness of the offense, the degree of likelihood that the person detained may have witnessed or been involved in the offense, the proximity in time and space from the scene of the crime, the urgency of the occasion, the nature of the detention and its extent, the means and procedures employed by the officer, the presence of any circumstances suggesting harassment or a deliberate effort to avoid the necessity of securing a warrant . . ."

United States v. Holland, 510 F.2d 453, 455-56 (9th Cir.), *cert. denied*, 422 U.S. 1010 (1975) (quoting *Arnold v. United States*, 382 F.2d 4, 7 (9th Cir. 1967)).

226. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). See *United States v. Luckett*, 484 F.2d 89, 90 (9th Cir. 1973) (per curiam) ("Once the police officers required appellee to come to the police car, he was 'seized' . . .").

Detention at gun point does not automatically transfer the stop into an arrest. *United States v. Thompson*, 558 F.2d 522, 524 (9th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978).

Any such detention must be reasonably related in scope to the circumstances justifying its inception.²²⁷ In *United States v. Contreras-Diaz*,²²⁸ however, police lawfully stopped defendant's vehicle while speeding but detained the passengers longer than was necessary to write the traffic citation. The detention was extended in order to give border patrol agents time to arrive. Observing that the passengers spoke no English, had no identification, physically resembled aliens, and gave conflicting stories as to their destination, the Ninth Circuit sustained the stop.²²⁹

An officer who has detained a suspect may lawfully conduct a weapons search when "justified in believing that the individual whose suspicious behavior he is investigating . . . is armed and presently dangerous."²³⁰ The search must be no more intrusive than necessary to discover weapons that could be used to harm the officer.²³¹ In 1977, this concern for the officer's safety prompted the Supreme Court to hold that the police, after stopping a vehicle for a traffic violation, may order the driver out of his auto so that his movements may be better observed.²³²

The specific articulable facts upon which the officer must base his "reasonable suspicion" need not be personally observed. Rather, a rea-

Although one's freedom of movement is restrained during a *Terry* stop, *Miranda* warnings need not be given. *United States v. Collom*, No. 77-1040, slip op. at 1867 (9th Cir. June 15, 1978).

227. *Terry v. Ohio*, 392 U.S. 1 (1968). See *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973) (per curiam) (without reasonable grounds for suspicion, detention of jaywalker to run warrant check unreasonable).

228. 575 F.2d 740 (9th Cir.), cert. denied, 439 U.S. 855 (1978).

229. *Id.* at 745.

230. *Terry v. Ohio*, 392 U.S. 1, 24 (1968). *E.g.*, *United States v. Walker*, 576 F.2d 253, 255-56 (9th Cir. 1978) (per curiam) (search of handbag reasonable after suspect reached into it before stop). See also *Adams v. Williams*, 407 U.S. 143, 146 (1972) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . .").

231. See *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) (per curiam) ("[T]he bulge in the jacket permitted the officer to conclude that [the traffic violator] was armed and thus posed a serious and present danger to the safety of the officer."); *United States v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976) (per curiam) (lifting of suspect's shirt not overly intrusive after officer spotted bulge in waistband that could have been a gun) ("*Terry* does not . . . limit a weapons search to a so-called 'pat-down' search. Any limited intrusion designed to discover guns, knives, clubs or other instruments of assault are permissible."). The scope of an investigatory search may be expanded, however, by the consent of the suspect. *United States v. Collom*, No. 77-1040, slip op. at 1867 (9th Cir. June 15, 1978).

232. *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 111 n.6 (1977) (per curiam). In *Mimms*, the Court found that the additional intrusion into the driver's freedom, after a valid stop, was minimal. "What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." *Id.* at 111.

sonable suspicion may be based on an informant's tip that has "sufficient indicia of reliability" to justify interrogation.²³³ In *United States v. Sierra-Hernandez*,²³⁴ for example, a *Terry* stop based on an informant's tip was upheld; the informant personally gave the information to the police officer, and the tip indicated that a specific individual was in the process of committing a specific crime nearby.²³⁵

4. Warrantless vehicle searches

Vehicle searches²³⁶ fall outside the fourth amendment warrant requirement when both probable cause and exigent circumstances exist at the time of the seizure.²³⁷ Although the finding of exigency traditionally rests upon the vehicle's mobility and the ease with which it may be moved from the area,²³⁸ warrantless searches have also been sustained when necessary to protect the guarding officers or the general public,²³⁹

233. *Adams v. Williams*, 407 U.S. 143, 147 (1972) ("Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized."). Cf. *United States v. DeVita*, 526 F.2d 81, 82-83 (9th Cir. 1975) (per curiam) (vague tip about possible criminal activity at uncertain future date from "unlisted" informant held unreliable).

234. 581 F.2d 760 (9th Cir. 1978).

235. *Id.* at 763. Whether the information is sufficient to justify detention must be determined from the facts of each case, for there is no per se rule of reliability. However, "[i]nformation from a citizen who confronts an officer in person to advise that a designated individual present on the scene is committing a specific crime should be given serious attention and great weight by the officer." *Id.*

236. Although courts usually refer to this warrant exception as the "automobile exception," it applies to a wide variety of vehicles. *E.g.*, *Carroll v. United States*, 267 U.S. 132, 151 (1925) ("goods in course of transportation and concealed in a movable vessel . . ." within exception); *United States v. Flickinger*, 573 F.2d 1349 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978) (warrantless search and seizure of aircraft held within exception); *United States v. Hickman*, 523 F.2d 323, 328-29 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) (warrantless search and seizure of boat held within exception).

237. *United States v. Trejo-Zambrano*, 582 F.2d 460, 463 (9th Cir. 1978) (vehicle searched after reliable informant told agents that marijuana was inside).

238. *United States v. Chadwick*, 433 U.S. 1, 12 (1977); *United States v. Azhocar*, 581 F.2d 735, 737 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1213 (1979); *United States v. Beasley*, 476 F.2d 164, 166 (9th Cir. 1973) (search of car at stationhouse upheld because "mobility" was still a factor); *United States v. Gibbs*, 435 F.2d 621, 623 (9th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) ("[A]gents had reasonable cause to believe that . . . [the parked car] would soon be moved outside the jurisdiction.").

239. *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (search of auto upheld where police believed a weapon to be inside) ("Here the justification . . . [was] concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle."); *Cooper v. California*, 386 U.S. 58, 61-62 (1966) (search of auto while in police custody upheld even though conducted one week after impoundment) ("It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."); *United States v.*

to prevent the destruction or removal of evidence,²⁴⁰ and to safeguard contraband and dangerous items.²⁴¹ Therefore, the fact that a car is stopped on the highway with probable cause to believe that it was involved in a crime is sufficient to justify an immediate search, without any further showing of exigency.²⁴²

A vehicle properly subject to search upon the highway may be removed to the stationhouse before the search is conducted.²⁴³ In *United States v. Trejo-Zambrano*,²⁴⁴ however, the Ninth Circuit went even further by validating a delayed warrantless automobile search conducted at a nearby gas station rather than at the police station. The court reasoned that by taking the car to the gas station the police "could conduct the search thoroughly, with more ease and with greater safety."²⁴⁵

In *South Dakota v. Opperman*,²⁴⁶ the Supreme Court confirmed that warrantless inventory searches of impounded vehicles may be conducted without probable cause.²⁴⁷ A proper inventory search must be conducted solely to protect the car or its contents; the police must have

Trejo-Zambrano, 582 F.2d 460, 463 (9th Cir. 1978) (when it could be done "with more ease and with greater safety," delayed search of vehicle stopped on highway upheld).

240. *Cady v. Dombrowski*, 413 U.S. 433, 448 (1972) (gun inside auto trunk "vulnerable to intrusion by vandals"); *United States v. Baker*, 567 F.2d 924, 926 (9th Cir.), *cert. denied*, 439 U.S. 818 (1978) (immediate search of parked car justified because of possibility that circling green van contained accomplices who might remove car).

241. *United States v. Moreno*, 569 F.2d 1049, 1052 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978) (search of auto held proper when police had probable cause to believe weapon inside).

242. *United States v. Trejo-Zambrano*, 582 F.2d 460 (9th Cir. 1978) (search of car believed to contain contraband proper); *United States v. Azhocar*, 581 F.2d 735 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1213 (1979); *United States v. Abascal*, 564 F.2d 821, 828 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978) (search of auto stopped on highway upheld when agents had probable cause to believe car contained LSD).

243. *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) ("[T]here is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.") (footnote omitted). As long as the initial stop is legal, the circumstances surrounding it are irrelevant in determining whether a delayed search will be valid. *Compare id.* n.10 (upholding delayed search of car stopped in a "dark parking lot in the middle of the night") with *Texas v. White*, 423 U.S. 67 (1975) (per curiam) (upholding delayed search of car seized at 1:30 in afternoon). Mr. Justice Marshall's dissent in *White* noted that in view of the time of the instant seizure there was "no indication that an immediate search would have been either impractical or unsafe for the arresting officers." 423 U.S. at 70.

244. 582 F.2d 460 (9th Cir. 1978).

245. *Id.* at 463.

246. 428 U.S. 364 (1976).

247. *Id.* at 370 n.5. The Court justified allowing inventory searches without probable cause by categorizing them as routine, non-criminal police procedures. *Id.* See also *United States v. Jamerson*, 549 F.2d 1263, 1271 (9th Cir. 1977) (discovery of contraband held proper although made while officer removing vehicle contents inventoried several hours earlier).

no investigatory motive.²⁴⁸ The Ninth Circuit has expanded *Opperman* by consistently validating any subsequent search of a vehicle validly seized for forfeiture.²⁴⁹ The Ninth Circuit reluctantly applied this rule in *United States v. Johnson*,²⁵⁰ upholding an extremely intrusive "inventory search" conducted two weeks after seizure for the avowed investigatory purpose of discovering contraband.²⁵¹

5. Seizure of items in plain view

The warrantless seizure of items in "plain view" is authorized when (1) the officer is legitimately in the area or on the premises at the time of the discovery,²⁵² (2) the objects to be seized are in plain view,²⁵³ (3) it is immediately apparent that the item is evidence, contraband, or the fruit or instrumentality of crime,²⁵⁴ and (4) the discovery of the item is

248. 428 U.S. at 376.

249. *E.g.*, *United States v. Johnson*, 572 F.2d 227, 232 (9th Cir.), *cert. denied*, 437 U.S. 907 (1978). *But see* *South Dakota v. Opperman*, 428 U.S. 364, 377 n.2 (1976) (Powell, J., concurring) ("[T]he unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances.").

250. 572 F.2d 227 (9th Cir.), *cert. denied*, 437 U.S. 907 (1978).

251. *Id.* at 233.

252. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) (plain view seizure of auto parked on private property struck down) ("[T]he [plain view] doctrine serves to supplement the prior justification . . . whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused."). *E.g.*, *Harris v. United States*, 390 U.S. 234, 236 (1968) (upholding seizure of evidence coming into plain view after agent lawfully opened door of impounded auto); *United States v. Blalock*, 578 F.2d 245, 248 (9th Cir. 1978) (plain view seizure upheld when agent in store making arrest was lawfully behind counter for purpose of flushing out and securing hidden persons when discovery occurred. *Cf.* *United States v. Basurto*, 497 F.2d 781, 788 (9th Cir. 1974) (police illegally entered defendant's home, so plain view seizure inadmissible); *United States v. Valentin*, 569 F.2d 1069, 1071 (9th Cir. 1978) (seizure of evidence appearing in plain view upheld when officer was lawfully in house to make arrest); *United States v. Oaxaca*, 569 F.2d 518, 522 (9th Cir.), *cert. denied*, 439 U.S. 926 (1978) (seizure of evidence appearing in plain view upheld when officers lawfully inside house during "hot pursuit").

253. It should be noted, however, that when police simply observe evidence in plain view they are not considered to be conducting searches within the fourth amendment. *Ker v. California*, 374 U.S. 23, 43 (1963) ("[T]he discovery of the brick of marijuana did not constitute a search, since the officer merely saw what was placed before him in full view."); *United States v. Walling*, 486 F.2d 229, 236 (9th Cir. 1973), *cert. denied*, 415 U.S. 923 (1974) (use of flashlight to illuminate interior of auto not a "search").

254. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) ("[T]he extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."); *United States v. Sedillo*, 496 F.2d 151, 152 (9th Cir.), *cert. denied*, 419 U.S. 947 (1974) (seizure of envelope in plain view in defendant's pocket upheld as inadvertent discovery of an "incriminating object"). The dissent in *Sedillo* took issue with the liberal interpre-

inadvertent.²⁵⁵

The fourth requirement of inadvertent discovery was addressed by the Ninth Circuit in 1978. In *United States v. Blalock*,²⁵⁶ the court validated the plain view seizure of a bag of heroin although the searching officers knew of the bag's contents in advance and its exact location.²⁵⁷ The court found the inadvertence requirement to be inapplicable because the agents entered the shop to effect a lawful arrest and not to seize the heroin.²⁵⁸

The Ninth Circuit in 1978 addressed whether the seizure of contraband is valid under the "plain view" doctrine when only an opaque container is visible to the seizing officer. In *United States v. Blalock*,²⁵⁹ only an unmarked brown paper bag was in plain view, but the police had information that heroin was inside. The court summarily upheld the search, stating that "[t]he inescapable nexus between the brown bag and the purpose of the Agents' entry and arrest of Blalock is too obvious to play riddle games."²⁶⁰

6. Consent searches

Law enforcement officers may conduct searches without warrants or probable cause if they first obtain the valid consent of the party or parties involved.²⁶¹ Searches based on the consent of a third party can be

tation of "immediately apparent" and argued that "[n]o view of the incriminating aspects of the check became plain until the search and the seizure had been concluded. Thus, it was not 'immediately apparent' that the envelope and the check were 'evidence incriminating the accused'." *Id.* at 153 (Hufstедler, J., dissenting). Mr. Justice Douglas, in a dissenting opinion to the Court's denial of certiorari, agreed that the plain view doctrine could not justify the seizure in *Sedillo*. 419 U.S. at 947-48 (Douglas, Brennan, & Marshall, JJ., dissenting).

255. *Coolidge v. New Hampshire*, 403 U.S. 443, 469 (1971). The Court reasoned that if incriminating evidence is found inadvertently, "it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves" to require the police to wait and obtain a warrant. *Id.* at 467-68.

256. 578 F.2d 245 (9th Cir. 1978).

257. *Id.* at 249.

258. *Id.* at 248-49. See also *United States v. Morell*, 524 F.2d 550, 555-56 (2d Cir. 1975) (inadvertence requirement not applicable because primary motive for entry was to make arrest rather than to seize evidence). Despite this reluctance to apply the inadvertence requirement, the Ninth Circuit has adopted Mr. Justice Stewart's reasoning and language in *Coolidge* which includes this requirement. *United States v. Brown*, 470 F.2d 1120, 1122-23 (9th Cir. 1972). See *United States v. Sedillo*, 496 F.2d 151, 152 (9th Cir.), *cert. denied*, 419 U.S. 947 (1974) (Hufstедler, J., dissenting).

259. 578 F.2d 245 (9th Cir. 1978).

260. *Id.* at 249.

261. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (stolen checks found during consent search of vehicle stopped for traffic violations). See *Bumper v. North Carolina*, 391 U.S. 543 (1968) (to get consent to search, police falsely told owner of the house that they had search warrant).

upheld under the "property" theory,²⁶² the "agency" theory,²⁶³ or the "assumption of risk" theory.²⁶⁴

The consent must be given freely and voluntarily and may not be the result of expressed or implied duress or coercion.²⁶⁵ Voluntariness is a question of fact to be determined on the basis of the totality of the circumstances.²⁶⁶ The trial court's findings on this issue will be dis-

262. Under this theory, consent to search will be upheld if the party consenting has a recognizable property interest in the place or object searched. *Bumper v. North Carolina*, 391 U.S. 543, 548 n.11 (1968) (consent by owner to search house and rifle binding on third party). See *id.* at 543 n.4 (Black, J., dissenting); *United States v. Walker*, 575 F.2d 209, 212 (9th Cir.), *cert. denied*, 439 U.S. 931 (1978) (partially relied on property theory by noting that "Stearns as a co-owner and possessor of the negatives and as owner (or co-owner) of the prints could consent to a search and thereby bind [defendant]").

263. The "agency theory" will validate a consent when the consenting party has been given authority to consent from the owner or possessor of the object of the search. *Stoner v. California*, 376 U.S. 483, 489 (1964) (hotel clerk did not have authority to consent to search of patron's room because consent could be given only by guest "either directly or through an agent."). The Court in *Stoner* stressed that the interpretation of "apparent authority" must be reasonable. *Id.* at 488. In *United States v. Walker*, 576 F.2d 253 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 865 (1979), for example, agents knocked on defendant's apartment door and were admitted by a woman who answered the door. The defendant later consented to a search, and the court upheld the entry and search by reasoning that "[t]he agents were admitted to the apartment by one who had apparent authority to permit entry." *Id.* at 256.

264. Use of this theory requires

mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (consent of one roommate to search room valid as against the other).

The Ninth Circuit used this theory once in 1978. In *United States v. Walker*, 575 F.2d 209 (9th Cir.), *cert. denied*, 439 U.S. 931 (1978), the defendant entrusted his friends to return to him developed photographic prints. While returning the pictures, however, one friend allowed them to be inspected by jail guards. The court found the search to be valid because a co-principal of the defendant, a co-owner of the negatives, had "assumed the risk that the messenger might consent to let anyone inspect or examine [the photographs]." *Id.* at 212. See *United States v. Murphy*, 506 F.2d 529, 530 (9th Cir. 1974), *cert. denied*, 420 U.S. 996 (1975) (employee's "custody of the key gave him sufficient dominion over the premises" to enable him to grant the necessary consent). In *United States v. Dubrofsky*, 581 F.2d 208 (9th Cir. 1978), consent to search a house was given by the defendant's living companion. Both resided on the premises, and the court held the companion's consent binding because she was a mutual user of the property.

265. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

266. *Id.* at 227; *United States v. Sierra-Hernandez*, 581 F.2d 760, 764 (9th Cir.), *cert. denied*, 439 U.S. 936 (1978); *United States v. Rothman*, 492 F.2d 1260, 1265 (9th Cir. 1973) (consent to search was not voluntary because it was "systematically psychologically coerced") ("Where the consent is obtained through a misrepresentation by the government . . . or under inherently coercive pressure and color of the badge . . . such a consent is not voluntary.").

The Ninth Circuit has isolated several factors which may be considered in evaluating the voluntary nature of consent. See, e.g., *United States v. Heimforth*, 493 F.2d 970, 972 (9th

turbed only if "clearly erroneous."²⁶⁷

Although consent need not be given with knowledge of the right to refuse,²⁶⁸ the government must meet a more stringent burden when consent is given while the consenting party is in police custody.²⁶⁹ The Ninth Circuit, however, has narrowly interpreted the term "custody." In *United States v. Scharf*,²⁷⁰ for example, the court refused to overturn a trial court ruling that consent to search, which was given in the presence of five police officers, one of whom stood holding a shotgun, was not given in a "custodial environment."²⁷¹

A valid consent search may not exceed the scope of the area for which the consent is given.²⁷² The failure to object to the continuation of the search, however, can be considered as an indicator that the search was within the scope of the initial consent.²⁷³

The Ninth Circuit held in 1978 that consent to an "administrative search" could not be judged by the same free and voluntary standard used in full-scale searches for evidence of crimes.²⁷⁴ In *McMorris v.*

Cir.), *cert. denied*, 416 U.S. 908 (1974) (sophistication of accused and presence of *Miranda* warnings); *United States v. Rothman*, 492 F.2d 1260, 1265 (9th Cir. 1973) (psychological atmosphere surrounding consent). It should be noted that mere acquiescence to the search may be insufficient to sustain a finding of voluntariness. *Id.* at 1264. *See also* *United States v. Collom*, No. 77-1040 (9th Cir. June 15, 1978) (consent to search rolled-up T-shirt after *Terry* stop in parking lot held voluntary).

267. *E.g.*, *United States v. Sierra-Hernandez*, 581 F.2d 760, 764 (9th Cir.), *cert. denied*, 439 U.S. 936 (1978).

268. *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973). Knowledge of one's right to refuse consent is only one factor to be considered in analyzing the "totality of circumstances." *United States v. Watson*, 423 U.S. 411, 424 (1976). It is unclear, however, whether the Supreme Court would require that persons in custody at the stationhouse be informed of the right to refuse consent. For although the *Watson* Court validated the consent given by an arrestee on a public street, the majority expressly noted that the arrestee was "not in the confines of the police station." *Id.*

269. *United States v. Rothman*, 492 F.2d 1260, 1265 (9th Cir. 1973); *United States v. Page*, 302 F.2d 81, 84 (9th Cir. 1962) (en banc). Mr. Justice Marshall recognized this higher standard when he observed: "Many Courts of Appeals have recognized that a custodial consent is different in kind from one obtained from a person not in custody, and have placed a stiff burden on the Government to validate the consent." *United States v. Watson*, 423 U.S. 411, 458 n.23 (1976) (Marshall, J., dissenting). Despite the importance placed by the Supreme Court on the noncustodial setting in *Schneckloth*, the Ninth Circuit has held consistently that consent given while a person is in police custody is valid. *E.g.*, *United States v. Page*, 302 F.2d 81, 83 (9th Cir. 1962) (en banc).

270. No. 77-3080 (9th Cir. Dec. 7, 1978).

271. *Id.*, slip op. at 4018.

272. *See* *United States v. Sierra-Hernandez*, 581 F.2d 760 (9th Cir.), *cert. denied*, 439 U.S. 936 (1978) (consent given to "look inside the trunk" but agent also looked in back cargo portion of trunk and under hood).

273. *Id.*

274. *McMorris v. Alioto*, 567 F.2d 897, 901 (9th Cir. 1978).

Alioto,²⁷⁵ the plaintiff-attorney was compelled to pass through a magnetometer and face the possibility of a limited body search each time he entered the San Francisco courthouse. The plaintiff argued that he did not voluntarily "consent" to the searches because he was forced either to submit to a search or forego the practice of law by being held in contempt each time he missed a court appearance. The Ninth Circuit rejected this claim, reasoning that persons are not "physically" coerced into the searches, for they "may leave the premises at any time, even after activating the magnetometer . . . [and] may not be subjected to a pat-down search unless . . . [they] fully and voluntarily agree to it."²⁷⁶

7. Border searches

Persons entering the United States at the border or its "functional equivalent"²⁷⁷ may be searched without any showing of probable cause.²⁷⁸ All such searches, however, must satisfy the "reasonableness" requirement of the fourth amendment.²⁷⁹ Additionally, only a single search at the border is permitted,²⁸⁰ and once the subject of a search

275. 567 F.2d 897 (9th Cir. 1978).

276. *Id.* at 901.

277. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Sayer*, 579 F.2d 1169 (9th Cir. 1978) (customs search of passenger arriving from Canada at Los Angeles International Airport was a valid border search). Mail and packages may also be searched at border equivalents. *See United States v. Botero*, 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2162 (1979) (search at San Francisco International Airport of leather handbags sent from Colombia valid); *United States v. Dubrofsky*, 581 F.2d 208 (9th Cir. 1978) (package mailed from Thailand validly searched at San Francisco International Airport). Unlike persons, however, mail or packages entering from abroad may be inspected only if customs officials have "reasonable cause" to suspect that the mail contains contraband. *United States v. Ramsey*, 431 U.S. 606, 611 (1977). *E.g.*, *United States v. Botero*, 589 F.2d at 432; *United States v. Dubrofsky*, 581 F.2d at 211. This standard is considerably less stringent than the requirement of probable cause. *Id.*

Airports are not the only "functional equivalents" of borders. In *United States v. Solmes*, 527 F.2d 1370, 1372 (9th Cir. 1975), the court held that a bay adjacent to the ocean was the functional equivalent of the border with regard to vessels that have traveled in foreign waters before entry.

278. *Carroll v. United States*, 267 U.S. 132, 154 (1925). *See United States v. Solmes*, 527 F.2d 1370, 1372 (9th Cir. 1975).

279. *Klein v. United States*, 472 F.2d 847, 849 (9th Cir. 1973). *Cf. United States v. Cameron*, 538 F.2d 254, 258-59 (9th Cir. 1976). The defendant in *Cameron* was subjected to two forced digital probes, two enemas, and was forced to drink a liquid laxative as part of a border search. Holding the search to be unreasonably intrusive, the court observed: "[A]lthough there is no per se requirement for a warrant to conduct a body search in border crossing cases . . . the absence of a warrant is an important factor in assessing the reasonableness with which the authorities acted." *Id.*

280. *United States v. Selby*, 407 F.2d 241, 242 (9th Cir. 1969). *See United States v. Sayer*, 579 F.2d 1169, 1171 (9th Cir. 1978) ("[t]he search in Los Angeles was merely a secondary examination which was a continuation of the preliminary inspection begun in Vancouver,"

has "mingled with the normal stream of commerce," customs officials must be reasonably certain that any contraband thought to be in the suspect's possession has entered from abroad.²⁸¹

A proper border search may be no more intrusive than necessary to determine whether the subject has contraband in his possession.²⁸² As the intrusiveness of the search increases, so also does the measure of the cause necessary to make it reasonable.²⁸³ For example, to uphold a strip search, the government need only show a "reasonable suspicion" that the suspect is carrying contraband.²⁸⁴ To justify a body cavity search, however, the more demanding "clear indication" standard must be met.²⁸⁵

Although fixed border patrol checkpoints²⁸⁶ are not considered to be

and not the second of two customs searches). *But cf.* *United States v. Palmer*, 575 F.2d 721, 723 (9th Cir.), *cert. denied*, 439 U.S. 875 (1978) ("The contention that a search conducted after the passenger has been passed through customs . . . can never be considered as a border search has been rejected by this court.").

281. *United States v. Sayer*, 579 F.2d 1169, 1170 (9th Cir. 1978) (search of passenger upheld after customs officials watched him disembark from plane and then speak briefly with one other person).

282. *United States v. Cameron*, 538 F.2d 254, 258 (9th Cir. 1976). *See United States v. Wilmont*, 563 F.2d 1298 (9th Cir. 1977) (patdown search followed by emptying of pockets, followed by second patdown search, followed by strip search held valid in view of suspect's unusual conduct).

283. *United States v. Palmer*, 575 F.2d 721, 723 (9th Cir.), *cert. denied*, 439 U.S. 875 (1978) (lifting of skirt to reveal undergarment far less intrusive than strip search and required less justification to render it reasonable).

284. *Id.*; *United States v. Carter*, 563 F.2d 1360, 1361 (9th Cir. 1977) (no decision on whether removal of artificial leg was equivalent to a strip search). Information provided by the companions of the person searched may be used to justify the strip search. *United States v. Gil de Avila*, 468 F.2d 184, 186 (9th Cir. 1972), *cert. denied*, 410 U.S. 958 (1973). The court should consider the totality of circumstances to determine the legality of strip searches. *United States v. Mastberg*, 503 F.2d 465, 469 (9th Cir. 1974).

285. *United States v. Cameron*, 538 F.2d 254, 257 (9th Cir. 1976) ("searches involving a 'serious invasion of personal privacy and dignity,' such as close scrutiny of intimate portions of the body, may proceed only when there is a clear indication or plain suggestion that the individual may be involved in the importation of contraband.") (quoting *United States v. Henderson*, 390 F.2d 805, 808 (9th Cir. 1967)).

Noting the extreme intrusiveness of body cavity searches, the Ninth Circuit has issued a cautionary warning to all officials: "In a situation thus laden with the potential for fear and anxiety, a reasonable search will include, beyond the usual procedural requirements, reasonable steps to mitigate the anxiety, discomfort, and humiliation that the suspect may suffer." *United States v. Cameron*, 538 F.2d at 258.

286. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). There is a difference between "permanent checkpoints" and "temporary checkpoints." Permanent checkpoints are maintained "at or near intersections of important roads leading away from the border," located within the meaning of *Martinez-Fuerte*, while temporary checkpoints are established in other strategic locations. *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976);

functional border equivalents,²⁸⁷ routine *stops* for questioning may nevertheless be conducted without consent, probable cause, or reasonable suspicion.²⁸⁸ Probable cause or consent, however, is required to justify any subsequent *searches* at fixed checkpoints.²⁸⁹ The Ninth Circuit found the requisite probable cause clearly lacking in *United States v. Rubalcava-Montoya*.²⁹⁰ The *Rubalcava-Montoya* court refused to sustain the search of defendant's vehicle when based only on the searching officer's knowledge that the suspect had been arrested previously for the same crime at the same location, and that he had a "dejected hangdog demeanor" when he exited his car.²⁹¹

Roving patrols in the vicinity of, but not at, the border may stop a vehicle only if the officers are aware of specific articulable facts, together with rational inferences from those facts, that warrant a suspicion that illegal entry or smuggling is in progress.²⁹² A subsequent search, however, must be based on probable cause.²⁹³

When an officer's constant surveillance of a particular vehicle in a sparsely populated area convinces him that the vehicle has just crossed the border, an "extended border search"²⁹⁴ may be conducted. As with

United States v. Vasquez-Guerrero, 554 F.2d 917, 920 (9th Cir.), *cert. denied*, 434 U.S. 865 (1977) (Oak Grove checkpoint was "permanent" and reasonable).

287. *United States v. Morgan*, 501 F.2d 1351, 1351 (9th Cir. 1974) (per curiam). See *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

288. See *United States v. Rubalcava-Montoya*, 597 F.2d 140 (9th Cir. 1978).

289. *United States v. Ortiz*, 422 U.S. 891, 896-97 (1975). *E.g.*, *United States v. Rubalcava-Montoya*, 597 F.2d 140 (9th Cir. 1978).

290. 597 F.2d 140 (9th Cir. 1978).

291. *Id.* at 142.

292. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 887 (1975) (roving patrol stopped defendant's vehicle solely because its occupants appeared to be of Mexican descent; subsequent search invalid); *United States v. Pulido-Santoyo*, 580 F.2d 352, 356 (9th Cir. 1978) ("A reasonable or founded suspicion is all that is necessary—some basis from which it can be determined that the detention was not arbitrary or harrassing."). The Ninth Circuit has also held that there is no substantial difference between the doctrines of "founded suspicion" and "reasonable suspicion." *United States v. Gonzales-Diaz*, 528 F.2d 925 (9th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 977 (1976).

In *United States v. Avalos-Ochoa*, 557 F.2d 1299 (9th Cir.), *cert. denied*, 434 U.S. 974 (1977), the court named several considerations relevant to determining whether a reasonable suspicion exists:

the location and traffic patterns of the area in which the vehicle is seen, information about recent illegal border crossings in the area, the driver's behavior such as erratic driving or attempts to escape, the appearance of a heavily loaded car, and the officer's experience in detecting illegal entry and smuggling.

Id. at 1302. See *United States v. Mastberg*, 503 F.2d 465, 468 (9th Cir. 1974) (considerations to establish a "real suspicion of smuggling" listed).

293. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975).

294. *United States v. Pulido-Santoyo*, 580 F.2d 352, 354 n.1 (9th Cir. 1978) (issue not decided because requirements of "founded suspicion" met); *United States v. Tutwiler*, 505

searches at the border itself, "extended border searches" will be upheld without a showing of even "reasonable suspicion."²⁹⁵

Generally, border search rulings will not be applied retroactively.²⁹⁶ In *United States v. Barela*,²⁹⁷ for example, the Ninth Circuit upheld a search that was valid under the then-existing law, but which became illegal under the rules of subsequent Supreme Court decisions.²⁹⁸

8. Probation searches

The Federal Probation Act²⁹⁹ provides that convicted offenders may be placed on probation "for such period and upon such terms and conditions as the court deems best."³⁰⁰ The Ninth Circuit has held that conditions of probation are only valid if they "contribute significantly both to the rehabilitation of the convicted person and to the protection of the public."³⁰¹

Rehabilitation can be accomplished by imposing any conditions "reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty."³⁰²

In *United States v. Consuelo-Gonzales*,³⁰³ the court observed that these conditions of probation could include the defendant's agreement to submit to all searches "conducted in a reasonable manner and at a reasonable time by a probation officer."³⁰⁴ Although the officer conducting the search reasonably must believe in the necessity of the incur-

F.2d 758, 759 (9th Cir. 1974) (search at checkpoint fifty miles from border not extended border search because of "interruption in keeping a complete surveillance of the defendant and his companion northbound from border.").

295. See *United States v. Pulido-Santoyo*, 580 F.2d 352 (9th Cir. 1978); *United States v. Tutwiler*, 505 F.2d 758 (9th Cir. 1974).

296. See *United States v. Peltier*, 422 U.S. 531, 534-35 (1975) (*Almeida-Sanchez* should not be applied retroactively); *United States v. Torres-Rios*, 534 F.2d 865, 867 (9th Cir. 1976), cert. denied, 429 U.S. 898 (1977) (*Brignoni-Ponce* should not be applied retroactively).

297. 571 F.2d 1108 (9th Cir.), cert. denied, 436 U.S. 963 (1978).

298. *United States v. Bowen*, 422 U.S. 916 (1975); *United States v. Ortiz*, 422 U.S. 891 (1975).

299. 18 U.S.C. § 3651 (1976).

300. *Id.* The purpose of the Act is to provide "an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict." *United States v. Murray*, 275 U.S. 347, 357 (1928).

301. *United States v. Consuelo-Gonzales*, 521 F.2d 259, 264 (9th Cir. 1975) (any contraband found during an improper probation search may not be used to convict the probationer of a new offense). Those conditions and restraints which are invalid with respect to prisoners and parolees will also be improper if applied to probationers. *Id.*

302. *Id.* at 263.

303. 521 F.2d 259 (9th Cir. 1975).

304. *Id.* at 263. The condition struck down in *Consuelo* required that the probationer

sion, probable cause to search need not be established.³⁰⁵ The Ninth Circuit in 1978, however, upheld a probation search based on an overly broad condition similar to that struck down in *Consuelo*,³⁰⁶ because the authority was "narrowly and properly exercised."³⁰⁷

The Ninth Circuit will not consider constitutional challenges to probation searches after the probation period has expired. In *Cervantes v. Walker*,³⁰⁸ for example, the defendant was convicted of possession of narcotics and was placed on three years probation. As a condition of probation, he was to submit to a search of his person and property at any time without notice. The issue of whether that condition was unconstitutional was found to be moot because the probationary period expired shortly before oral argument.³⁰⁹

F. Identifications

The sixth amendment right to counsel³¹⁰ attaches when "the accused requires aid in coping with legal problems or assistance in meeting his adversary."³¹¹ It is well established that a post-indictment lineup is a "critical stage" in the proceedings and that the accused therefore has the right to presence of counsel.³¹² The Ninth Circuit has, however,

submit to searches of her person or property any time that a law enforcement officer requested. *Id.* at 261 n.1.

305. *Id.* at 266. All that is necessary to sustain a probation search is "a reasonable belief on the part of the probation officer that such a search is necessary to perform properly his duties." *Id.*

306. That condition read: "You shall submit person and property to search and seizure at any time of the day or night when so requested by a probation officer with or without a warrant and with or without probable cause." *United States v. Jeffers*, 573 F.2d 1074, 1075 (9th Cir. 1978).

307. *Id.* *United States v. Gordon*, 540 F.2d 452, 454 (9th Cir. 1976) (search pursuant to overbroad condition of probation reasonable where probation officer had received information that probationer was violating the conditions of his probation and search was reasonably and properly exercised). *Gordon* held that *Consuelo* "established the proper language for future probation orders, but it did not invalidate prior, broader orders which would be narrowly and properly exercised." *Id.* Although the search in *Jeffers* was conducted with the aid of police officers, the court stated that "[a] probation officer may enlist the aid of police, and police may be present to expedite a search." *United States v. Jeffers*, 573 F.2d 1074, 1075 (9th Cir. 1978). See *United States v. Consuelo-Gonzales*, 521 F.2d 259, 266 (9th Cir. 1975) (probation search may be made "under the immediate and personal supervision of probation officers").

308. 589 F.2d 424 (9th Cir. 1978).

309. *Id.* at 425.

310. U.S. CONST. amend. VI. The amendment provides in part: "In all criminal proceedings the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

311. *United States v. Ash*, 413 U.S. 300, 313 (1973).

312. *United States v. Wade*, 388 U.S. 218, 237 (1967).

refused to extend the counsel guarantee to conferences between a witness and prosecuting authorities held either during or after the lineup.³¹³ The Supreme Court has held that no sixth amendment right to counsel exists at post-indictment identifications based on photo displays,³¹⁴ and the Ninth Circuit, in *United States v. Kim*,³¹⁵ has apparently extended that rationale to identifications based on recorded sounds. In *Kim*, the court held that a pre-trial identification of voices obtained through lawful electronic surveillance is not a critical stage of a criminal proceeding for sixth amendment purposes.³¹⁶

In cases where the defendant is not entitled to presence of counsel during identification procedures, he may nonetheless assert a fifth or fourteenth amendment due process claim if the identification was conducted in a manner "unnecessarily suggestive and conducive to irreparable mistaken identification."³¹⁷ In accord with this standard is *Simmons v. United States*³¹⁸ wherein it was stated that "convictions based on eyewitness identifications at trial following a pre-trial identification by photograph will be set aside only if the photograph procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification."³¹⁹ The Ninth Circuit has generally utilized a two-part approach in implementing this decision.³²⁰ First, the court considers the necessity of the procedure and second, it determines the substantial likelihood of irreparable mis-identification by using the "totality of the circumstances" criteria enunciated in *Neil*

313. *United States v. Rich*, 580 F.2d 929, 933 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (fact that defendant's counsel was absent from the post-lineup interview of a witness did not constitute a denial of due process); *United States v. Parker*, 549 F.2d 1217, 1223 (9th Cir.), *cert. denied*, 430 U.S. 971 (1977) (counsel's presence not required during post-lineup conversation); *Doss v. United States*, 431 F.2d 601, 603 (9th Cir. 1970) (defendants' counsel is not entitled to listen in on any remarks that may pass between witnesses and officers, both during the proceeding or afterward).

314. *United States v. Ash*, 413 U.S. 300, 317-21 (1973) (presence of counsel not essential because of ability to recreate photo spread and confront witnesses at trial).

315. 577 F.2d 473 (9th Cir. 1978).

316. *Id.* at 480-82.

317. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

318. 390 U.S. 377 (1968).

319. *Id.* at 384. *See United States v. Ash*, 413 U.S. 300, 320 (1973) (due process requirement provides protection in any identification procedure conducted in absence of counsel).

320. *See, e.g., United States v. Flickinger*, 573 F.2d 1349, 1358 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978) (court states that *Stovall* suggests such a test); *United States v. Peele*, 574 F.2d 489, 490 (9th Cir. 1978) (court states test as a balancing process); *United States v. Pheaster*, 544 F.2d 353, 369-70 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977); *United States v. Valdivia*, 492 F.2d 199, 210 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). In *Pheaster*, the Ninth Circuit suggests that the two-part approach was initiated by the decision of *United States v. Baxter*, 492 F.2d 150 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

v. Biggers.³²¹ Using this standard, it has been held that lack of necessity for a pre-trial identification procedure is not sufficient by itself to invalidate an in-court identification.³²² Further, unnecessary suggestibility alone will not require exclusion of identification testimony, for the primary focus is on the reliability of the witness.³²³

In the case of *United States v. Crawford*,³²⁴ the Ninth Circuit seems to have stepped away from the two-part approach. The court stated that, if the necessity of the procedure should be given any effect at all, it should be considered as part of the evaluation of the law enforcement officials' conduct that may have made the identification "impermissibly suggestive."³²⁵ The *Crawford* court asserts that *Simmons* never established a two-part test and that "necessity" was simply one factor in the overall evaluation.³²⁶ In a footnote,³²⁷ the court pointed out that the factors utilized in *Neil* were not "precisely applicable"³²⁸ to *Simmons* or the present case, because *Neil* involved exclusion of evidence of a pre-trial identification and *Simmons* and *Crawford* involved overturning a conviction based on an in-court identification.

While this is a departure from previous Ninth Circuit language, it does not appear to be a significant break. The court merely removes the first prong of the two-part test and places it with the factors to be considered in the second prong. However, doubt now exists as to the nature of the test and the weight of the factors involved. This has especial relevance when considering *Washington v. Cupp*.³²⁹ There the Ninth Circuit held that reliability of an out-of-court identification allegedly tainted by earlier suggestive out-of-court identification procedures will be tested by using the same standard as for in-court identification.³³⁰ Will the court use the two-part approach or will it

321. 409 U.S. 188 (1972). This inquiry should focus broadly on "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200.

322. *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977).

323. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

324. 576 F.2d 794 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 851 (1978).

325. *Id.* at 797.

326. *Id.*

327. *Id.* n.1.

328. *Id.*

329. 586 F.2d 134 (9th Cir. 1978).

330. *Id.* at 136-37.

utilize the *Crawford* standard?³³¹

The rule that unnecessary suggestibility by itself will not require exclusion of identification testimony was originally enunciated with regard to visual identification.³³² In *United States v. Flickinger*,³³³ the Ninth Circuit held that this test was "equally applicable to a voice identification."³³⁴ In *Flickinger*, an FCC agent identified two suspects by comparing a recording of two voices with the live voices of the suspects. The court found the identification procedure unnecessarily suggestive in that it was akin to a face-to-face interview rather than a lineup.³³⁵ However, several factors indicated that the suggestive element did not undermine the reliability of the identification. First, the agent was experienced in voice identification; second, he had a tape of the voices and was able to become very familiar with their sound so as to assure more reliable identification; and third, the identification was based solely on his own comparison between the taped and live voices.³³⁶

Flickinger is consistent with other cases decided in the Ninth Circuit this past year in that the court has focused on the reliability of the witnesses' identification rather than on the flaws of the pre-trial identification procedure.³³⁷

331. It is interesting to note that in *United States v. Barron*, 575 F.2d 752 (9th Cir. 1978), decided 12 days after *Crawford* and involving much the same factual situation (pretrial photo identifications) the court made no mention of the *Crawford* decision or the test enunciated therein.

332. *Stovall v. Denno*, 388 U.S. 293 (1967).

333. 573 F.2d 1349 (9th Cir.), cert. denied, 439 U.S. 836 (1978).

334. *Id.* at 1358.

335. *Id.*

336. *Id.* *United States v. Kim*, 577 F.2d 473 (9th Cir. 1978) (identification upheld even though F.B.I. agent who conducted voice identification asked each witness if he could identify a particular defendant and then asked the witness to identify that defendant while a tape of his voice was being played; not impermissible prompting). See also *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) (police officer's in-court identification of defendant's voice upheld because it was based on the officer's independent acquaintance with the defendant and not upon the unnecessarily suggestive pre-trial identification).

337. *United States v. Barron*, 575 F.2d 752, 754 (9th Cir. 1978) (where defendant was only one in lineup with a big nose; only one of twenty-five surveillance pictures displayed the victim bank in background; some witnesses viewed allegedly suggestive photo spread before viewing lineup pictures; some witnesses making identification from photo spread were aware the other witnesses had positively identified someone at the lineup; one witness received non-verbal approval after making identification and another was told she made correct selection; court upheld in-court identification); *United States v. Flickinger*, 573 F.2d 1349, 1358 (9th Cir.), cert. denied, 439 U.S. 836 (1978) (citing *Manson v. Brathwaite*, 432 U.S. 98, 111 (1977)).

In *United States v. Rich*, 580 F.2d 929, 935 (9th Cir.), cert. denied, 439 U.S. 935 (1978),

In *United States v. Satterfield*,³³⁸ the court stated that the "manner in which in-court identifications are conducted rests with the sound discretion of the trial court."³³⁹ So long as attempts are made to minimize any prejudicial effect and the probative value outweighs such effect, the identification will be admissible.³⁴⁰ In *Satterfield*, the defendant was made to wear a mask similar to the one involved in the crime. The probative value outweighed the prejudicial impact because: (a) by seeing the defendant in the mask the jury could better evaluate the witness' ability to make a positive identification; (b) the jury could compare the defendant to the person pictured in the bank surveillance photographs; and (c) defendant was allowed to put it on and remove it outside the presence of the jury thereby restricting the possibly prejudicial use to the minimum necessary.³⁴¹

Finally, in *United States v. Peele*,³⁴² the Ninth Circuit considered a due process claim where there was no government involvement in the suggestive identification procedure. In that case, the witness had seen defendant's picture in the newspaper and she told the prosecuting authorities that it helped her in identifying the defendant at a lineup.³⁴³ The court enunciated the familiar two-part approach used to determine whether defendant's due process rights were violated by the pre-trial identification³⁴⁴ but concluded that it was not applicable since there was no government involvement.³⁴⁵

II. PRELIMINARY PROCEEDINGS

A. Grand Jury

1. Selection

The fifth amendment provides that, in federal criminal prosecutions, "[n]o person shall be held to answer for a capital, or otherwise infa-

appellant was the only participant in a lineup whose picture had been used in a prior photo display. Five weeks had passed between the photo identification and the lineup, nevertheless the procedure was upheld by the court. While the court did not specifically focus on the reliability of the identification, the inference of such appears strong.

338. 572 F.2d 687 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978).

339. *Id.* at 690.

340. *Id.*

341. *Id.*

342. 574 F.2d 489 (9th Cir. 1978).

343. *Id.* at 490.

344. See notes 320-24 and accompanying text.

345. 574 F.2d at 490 (9th Cir. 1978). However, the court made it clear that a case might arise where the mind of a witness is so clouded by suggestions from non-government sources that a conviction based principally on the testimony of that witness violates due process. *Id.*

mous crime, unless on a presentment or indictment of a Grand Jury.”³⁴⁶ The Supreme Court has long recognized that, while a state need not provide for a grand jury indictment,³⁴⁷ if it does use the grand jury, the jury may not be selected in a manner that deliberately and systematically discriminates against persons of a particular race.³⁴⁸ Congress, in 1968, enacted the Jury Selection and Service Act³⁴⁹ to ensure that juries are chosen from a fair cross-section of the community in the district in which the court convenes and that no citizen is excluded because of race, color, religion, sex, national origin or economic status.³⁵⁰

In *United States v. Brady*³⁵¹ the defendants contended that the Montana Jury Selection Plan systematically excluded Indians from the grand and petit panels in violation of the Federal Act.³⁵² Section 1867 of the Act provides for a dismissal of indictment or a stay of proceedings if there has been a substantial failure to comply with its provisions,³⁵³ and section 1863 allows additional sources to supplement the voter lists when it is determined that the voter lists do not represent a fair cross-section of the community.³⁵⁴

The Ninth Circuit recently created a new test to determine when supplemental source lists should be added to voter lists to implement the purposes of the Act; the inquiry focuses on whether there is a “substantial deviation” between cognizable groups’ numbers in the community and their representation on the voter list.³⁵⁵ This standard represented a sudden departure from previous Ninth Circuit authority, which re-

346. U.S. CONST. amend. V.

347. *Hurtado v. California*, 110 U.S. 516 (1884) (due process clause of the fourteenth amendment does not require grand jury indictment in a state prosecution for murder).

348. See *Peters v. Kiff*, 407 U.S. 493 (1972) (white defendant entitled to federal habeas corpus relief when all blacks were systematically excluded from state grand and petit juries that indicted and convicted him); *Neal v. Delaware*, 103 U.S. 370 (1880) (discriminatory administration of fair jury selection laws is unconstitutional).

349. 28 U.S.C. §§ 1861-1874 (1976).

350. *Id.* §§ 1861-1862.

351. 579 F.2d 1121 (9th Cir. 1978).

352. Appellant argued the latest census figures showed that Indians comprised approximately 30% of the population of Rosebud County (one of 15 counties in the Billings Division), while only 6 1/2% of those selected for the grand jury from that county were Indian. Appellant also presented evidence that Indians comprised only 4 1/4% of the registered voters. *Id.* at 1133-34.

353. 28 U.S.C. § 1867 (1976).

354. *Id.* § 1863(b)(2).

355. *United States v. Potter*, 552 F.2d 901, 903 (9th Cir. 1977) (defendant failed to establish substantial underrepresentation of blacks on grand jury panel). See also *United States v. Kleifgen*, 557 F.2d 1293, 1296 (9th Cir. 1977) (defendant failed to prove blacks or males were substantially underrepresented on the grand jury panel).

quired proof of "systematic exclusion."³⁵⁶ In *Brady*, the court incorporated both tests and held that, to prevail under either a constitutional challenge or a statutory challenge, appellants must prove either a "systematic exclusion" of an identifiable group or "substantial deviation" between identifiable groups on a division-wide basis.³⁵⁷

In applying these new standards in *Brady*, the Ninth Circuit held that while Indians formed a cognizable group³⁵⁸ able to challenge the Montana Jury Selection Plan, they failed to support their claim by offering statistical proof of substantial deviation on a district- or division-wide basis.³⁵⁹ The fact that no Indian was called on three successive grand jury panels did not establish "substantial deviation."³⁶⁰

2. Witnesses

Once the grand jury has been impaneled, it has the power to subpoena witnesses and to compel the production of documents.³⁶¹ While the fifth amendment's privilege against self-incrimination applies in the grand jury setting,³⁶² it is not a violation of the privilege to compel handwriting samples for identification purposes so long as they are not

356. *United States v. Brady*, 579 F.2d 1121, 1131-32 (9th Cir. 1978). See *United States v. James*, 453 F.2d 27, 29 (9th Cir. 1971) (plaintiff must show a discriminatory purpose or effect in the jury selection plan); *United States v. Parker*, 428 F.2d 488, 489 (9th Cir.), *cert. denied*, 400 U.S. 910 (1970) (plaintiff has burden to show systematic exclusion of an identifiable group in the community to show a prima facie case). These two tests appear to mirror those adopted by the Supreme Court in *Swain v. Alabama*, 380 U.S. 202 (1965), for constitutional challenges to the composition of juries. *United States v. Brady*, 579 F.2d at 1132.

357. 579 F.2d at 1133. Following the lead of the Fifth Circuit in *Foster v. Sparks*, 506 F.2d 805, 816-17 (5th Cir. 1975), the Ninth Circuit incorporated the test of "substantial deviation" for constitutional challenges to the jury panel developed by the Supreme Court in *Castenada v. Partida*, 430 U.S. 482 (1977), into the previous Ninth Circuit test of "systematic exclusion" for statutory challenges laid down in *United States v. James*, 453 F.2d 27, 29 (9th Cir. 1971). The *Brady* Court thus removed any distinction between a constitutionally-selected jury and a jury properly selected under the Act. 579 F.2d at 1132-33.

358. The requirement of a cognizable group originated in *Hernandez v. Texas*, 347 U.S. 475, 478 (1954), in which the Supreme Court held that the determination of a cognizable group is a question of fact. It must be demonstrated that the law singled out this class and treated it differently based on economic, social, political, racial, religious, or geographic grounds. Systematic exclusion based on these grounds violates the cross-section requirement. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946). See also *Ballard v. United States*, 329 U.S. 187, 195 (1946) (women may not be excluded from federal juries).

359. 579 F.2d at 1134.

360. *Id.* at n.3.

361. *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (government has the power to compel persons to testify before grand juries).

362. *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (defendant under investigation for securities violations is not obliged to answer questions after invoking the fifth amendment).

used as testimonial expressions of the truth of the writing.³⁶³

The Supreme Court, in *Fisher v. United States*,³⁶⁴ rejected the contention that an attorney could raise the fifth amendment privilege in his client's behalf.³⁶⁵ The decision did, however, establish a test for the proper assertion of an attorney-client privilege. Relying on federal evidentiary rules, the Court held that if documents were turned over to an attorney by a client in the course of seeking legal advice, and if a client would have a fifth amendment privilege if the documents had been in his possession, the attorney may successfully raise the attorney-client privilege in response to a subpoena duces tecum.³⁶⁶ If the proceeding is before a state court, however, the attorney-client privilege is a matter of state law.³⁶⁷ The existence of an attorney-client privilege is therefore determined on the basis of federal evidentiary rules rather than on constitutional considerations. In *Lowthian v. United States*,³⁶⁸ the Ninth Circuit ruled that the proper procedure for challenging a subpoena duces tecum is for the attorney to refuse to produce the documents and then to appeal any contempt judgment entered against him as a result of that refusal.³⁶⁹

Although a witness may refuse to testify to facts that might incriminate him,³⁷⁰ one who refuses to testify or provide information without just cause is subject to civil contempt and can be confined during the life of the grand jury proceedings; in no case, however, may this confinement exceed eighteen months.³⁷¹

And, finally, while proceedings of the grand jury are secret,³⁷² gener-

363. *Gilbert v. California*, 388 U.S. 263, 266-67 (1967). *E.g.*, *United States v. Antill*, 579 F.2d 1135, 1136 (9th Cir. 1978) (handwriting sample is an identifying physical characteristic outside protection of fifth amendment; request for specific phrases in handwriting not violative of fifth amendment privilege).

364. 425 U.S. 391 (1976).

365. *Id.* at 396. In *Fisher*, the Internal Revenue Service had summoned attorneys to produce specified documents prepared by their client's accountants, and the attorneys raised the client's fifth amendment privilege.

366. *Id.* at 401-05; *In re Fred R. Wittee Center Glass No. 3*, 544 F.2d 1026, 1028 (9th Cir. 1976) (work papers prepared by accountant can be subpoenaed so long as taxpayer producing them is not compelled to "restate, repeat or affirm" the incriminating information).

367. *Beckler v. Superior Court*, 568 F.2d 661, 662 (9th Cir. 1978) (attorney-client privilege is a matter of state law and not a matter of constitutional law under the fifth amendment).

368. 575 F.2d 1292 (9th Cir. 1978).

369. *Id.* at 1293.

370. *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

371. 28 U.S.C. § 1826 (1976); *In re Garmon*, 572 F.2d 1373 (9th Cir. 1978) (court allowed the civil contempt sentence to be imposed upon a witness already serving a criminal sentence by suspending the criminal sentence during the period of the contempt confinement).

372. FED. R. CRIM. P. 6(e). For the Supreme Court's rationale for secrecy of the grand jury, see *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958).

ally, testimony before the grand jury can be used for impeachment purposes.³⁷³

B. Indictments

1. When required

The fifth amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."³⁷⁴ The Federal Rules of Criminal Procedure codify this requirement and require an indictment for offenses punishable by death or imprisonment for a term exceeding a year, but any other offense may be prosecuted by indictment or information.³⁷⁵ A defendant whose offense does not fit within these requirements is not entitled to a criminal indictment.³⁷⁶

2. Sufficiency

The indictment must be a plain, concise, and definitive statement of the essential facts constituting the offense charged.³⁷⁷ It must adequately inform the defendant of the charges against him,³⁷⁸ and may not be so unfairly ambiguous or vague as to mislead him.³⁷⁹ A defendant has standing to object to the wording of an indictment if, by naming an unindicted co-conspirator, it is unduly prejudicial to him.³⁸⁰ A

373. *United States v. Shield*, 571 F.2d 1115, 1120 (9th Cir. 1978) (court allowed impeachment of witness before the grand jury with the transcript of the grand jury proceedings); *Gollaher v. United States*, 419 F.2d 520, 523 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969) (use of grand jury testimony to impeach defendant was proper and any weight as affirmative evidence was incidental to its impeachment purpose).

374. U.S. CONST. amend. V.

375. FED. R. CRIM. P. 7(a).

376. *United States v. Marthaler*, 571 F.2d 1104, 1105 (9th Cir. 1978) (defendant charged with criminal contempt of court is not entitled to indictment).

377. FED. R. CRIM. P. 7(c)(1).

378. *United States v. Charnay*, 537 F.2d 341, 351-53 (9th Cir.), *cert. denied*, 429 U.S. 1000 (1976) (indictment alleging knowing participation in securities fraud sufficient; specific intent not required because not an element of the crime); *United States v. Hamling*, 481 F.2d 307, 312 (9th Cir. 1973), *aff'd*, 418 U.S. 87, 117 (1974) (indictment in language of statute prohibiting knowledgeable mailing of obscene matter sufficiently advised defendant of charges).

379. *United States v. Allsup*, 573 F.2d 1141, 1145-46 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978) (slightly erroneous recitation of facts did not make indictment for transportation and possession of firearms by convicted felon unduly inflammatory or prejudicial); *United States v. Love*, 535 F.2d 1152, 1158 (9th Cir.), *cert. denied*, 429 U.S. 847 (1976) (surplusage in indictment regarding requisite intent for mail fraud not misleading or prejudicial when defendant represented by counsel chargeable with knowledge of intent necessary to prove offense).

380. *United States v. Lyman*, 592 F.2d 496 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2864

defendant lacks standing, however, to raise the due process claims of the unindicted co-conspirator.³⁸¹

An indictment is sufficient if it sets forth the essential facts constituting an offense in the language of the proscriptive statute, or if it refers directly or by implication to the essential elements of the crime.³⁸² When the indictment is sufficient, it is within the court's discretion to allow a bill of particulars.³⁸³ Absent abuse, the exercise of this discretion will not be disturbed.³⁸⁴

Federal Rule 7 of Criminal Procedure requires that the indictment be signed by a government attorney.³⁸⁵ The signature of the United States Attorney himself, however, is not necessary. The Ninth Circuit, in *United States v. Walls*,³⁸⁶ held that the signature of an assistant United States Attorney was sufficient to show the concurrence of the United States Attorney in an action taken by the grand jury.³⁸⁷ Rule 7 permits allegations made in one count of the indictment to be incorpo-

(1979) (defendant not prejudiced by the naming of an unindicted co-conspirator when jury instructed that indictment was not evidence).

381. *Id.* at 502-03.

382. *United States v. Anderson*, 532 F.2d 1218, 1222 (9th Cir.), *cert. denied*, 429 U.S. 839 (1976). See *United States v. Chenaar*, 552 F.2d 294 (9th Cir. 1977), in which defendant alleged that the indictment which closely followed statutory language of 18 U.S.C. § 1006 (1976) (fraud against government institutions), was insufficient to adequately inform him of the nature of the charges against him. The Ninth Circuit held that the indictment was sufficient because it stated precise dates and amounts with respect to the fraudulent transactions. *Id.* at 301. See also *Hamling v. United States*, 418 U.S. 87, 117-18 (1974) (sufficiency of indictment defined); *United States v. Hess*, 124 U.S. 483, 487 (1888) (language of statute may be used in a general sense so long as accompanied by a statement of facts sufficient to inform accused of specific offense); *United States v. Markee*, 425 F.2d 1043, 1047-48 (9th Cir.), *cert. denied*, 400 U.S. 847 (1970) (distinction exists between an indictment that fails to state essential facts and one that fails to state theory upon which the facts will be proved).

In *United States v. Bolar*, 569 F.2d 1071 (9th Cir. 1978), the indictment for possession of counterfeiting materials was not fatally defective in failing to state that photographic negatives of Federal Reserve notes were subject to forfeiture, since defendant was not deprived of the opportunity to seek return of negatives and since such negatives were, per se, contraband. Cf. *United States v. Hall*, 521 F.2d 406, 408 (9th Cir. 1975) (defendant prosecuted for smuggling diamonds on indictment which failed to state smuggled materials must be forfeited to the United States was deprived of opportunity to contest the forfeiture).

383. FED. R. CRIM. P. 7(f); *United States v. Dreitzler*, 577 F.2d 539, 553 (9th Cir. 1978) (court's refusal to allow a bill of particulars was not an abuse of discretion when the indictment was adequate to allow defendant to prepare his defense); *United States v. Chenaar*, 552 F.2d 294, 302 (9th Cir. 1977) (proper exercise of discretion to deny motion for bill of particulars when prosecutor supplied information requested in open court instead of giving written bill).

384. *United States v. Clay*, 476 F.2d 1211, 1215 (9th Cir. 1973) (no abuse of discretion in denying bill of particulars when defendant given full discovery).

385. FED. R. CRIM. P. 7(c)(1).

386. 577 F.2d 690 (9th Cir.), *cert. denied*, 439 U.S. 893 (1978).

387. *Id.* at 696. *Accord*, *United States v. Wright*, 365 F.2d 135, 137 (7th Cir. 1966), *cert.*

rated by reference into another count in order to avoid unnecessary repetition.³⁸⁸ Dismissal of one count of an indictment, if referred to in remaining counts, does not require reversal of the conviction of the remaining counts if the reference is so complete so as to incorporate the matter from the dismissed counts.³⁸⁹

3. Duplicity and multiplicity

The problem of duplicity arises when an indictment charges two or more distinct offenses in a single count, thereby precluding the jury in a general verdict from acquitting or convicting the defendant on each separate charge. In order for a defendant to dismiss an indictment on the grounds of duplicity, substantial prejudice must be shown³⁹⁰ and the objection must be made by a motion prior to trial.³⁹¹

A multiplicitous indictment is one which charges a single offense in several counts. A defendant may be prejudiced by multiple sentences resulting from a single offense.³⁹² The imposition of consecutive sentences based on multiplicitous counts is therefore deemed unconstitutional.³⁹³

denied, 386 U.S. 918 (1967); *Abramson v. United States*, 326 F.2d 565, 567 (5th Cir.), *cert. denied*, 377 U.S. 957 (1964).

388. FED. R. CRIM. P. 7(c)(1). *See, e.g.*, *United States v. Shavin*, 287 F.2d 647, 650 (7th Cir. 1961), *cert. denied*, 375 U.S. 944 (1963); *Barnard v. United States*, 16 F.2d 451, 453 (9th Cir. 1926), *cert. denied*, 274 U.S. 736 (1927).

389. *See United States v. Weiner*, 578 F.2d 757 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978). The defendant in *Weiner* contended his conviction on six counts of securities fraud should be reversed because the first paragraph of each count realleged by reference portions of the two counts of conspiracy which were dismissed before the case was submitted to the jury. The Ninth Circuit held that the reference to the dismissed counts was sufficiently full to incorporate them into the remaining counts. *Id.* at 776.

390. *United States v. Buck*, 548 F.2d 871 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977) (defendant claimed indictment was duplicitous in that it charged two separate statutory violations stemming from the same acts; appellate court found the acts to constitute two separate offenses; even assuming the charges were duplicitous, defendant failed to show prejudice).

391. In *United States v. Gulino*, 588 F.2d 256 (9th Cir. 1978), the Ninth Circuit held that a defendant who failed to object to the indictment on grounds of duplicity until appeal had waived the error. Defendant also claimed counts I and V of his indictment for perjury before the grand jury were duplicitous, but the court found each count contained a separate instance of perjury.

In *United States v. Buck*, 548 F.2d 871 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977), and *Gulino*, both defendants asserted as duplicitous two separate counts charging the same offense. An analysis of the cases indicates this was really a multiplicity question, but the court, in both cases, chose to dispose of the case assuming the defendants' charges that the indictment was duplicitous.

392. *See United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (multiplicitous indictment pyramids punishment for single offense).

393. *Launius v. United States*, 575 F.2d 770, 771 (9th Cir. 1978) (two counts of indictment

4. Evidence before the grand jury

In *United States v. Fried*,³⁹⁴ the Ninth Circuit affirmed its position that, when a duly constituted grand jury returns an indictment valid on its face, no independent inquiry may be made to determine the sufficiency of the evidence presented to the grand jury. Although the indictment may be challenged if it can be demonstrated there is a complete absence of evidence,³⁹⁵ a heavy burden is placed on the one who challenges the presumption of validity.³⁹⁶

5. Prosecutorial misconduct

The federal courts, in the exercise of their inherent supervisory powers, have the discretion to dismiss an indictment on the basis of governmental misconduct.³⁹⁷ This remedy is used to discourage future deliberate prosecutorial misconduct and to preserve judicial integrity.³⁹⁸ The Ninth Circuit, however, considers this a harsh sanction and has been reluctant to dismiss indictments because of prosecutorial misconduct.³⁹⁹ In *United States v. Owen*,⁴⁰⁰ the court adopted the view held by the Fifth, Seventh, and Eighth Circuits that there must be actual prejudice to the accused by virtue of the alleged acts of miscon-

charging conspiracy were multiplicitous when in fact there was but one conspiracy; consecutive sentences imposed on the two counts violated double jeopardy clause). See *United States v. Corbin Farm Serv.*, 578 F.2d 259 (9th Cir. 1978), where the Ninth Circuit held that an indictment charging ten counts of violating the Migratory Bird Treaty Act was multiplicitous and dismissed nine counts.

394. 576 F.2d 787, 792 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978). See *Costello v. United States*, 350 U.S. 359, 363-64 (1956) (indictment valid on its face returned by legally constituted and unbiased grand jury is sufficient to bring defendant to trial).

395. *United States v. Romero*, 585 F.2d 391, 399 (9th Cir. 1978) (record failed to establish a complete absence of competent evidence to support grand jury indictment).

396. *United States v. Prescott*, 581 F.2d 1343, 1347 (9th Cir. 1978) (defendant failed to show insufficient evidence was presented to grand jury to warrant indictment). See *Martin v. United States*, 335 F.2d 945, 949 (9th Cir. 1964) (heavy burden is placed on one who seeks to prove there was no competent evidence before grand jury).

397. See generally *United States v. Baskes*, 433 F. Supp. 799, 804-07 (N.D. Ill. 1967).

398. *Elkins v. United States*, 364 U.S. 206, 217 (1960) (exclusionary rule is to deter governmental misconduct); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir. 1977), *cert. denied*, 434 U.S. 851 (1978) (when government received order to locate informant for defense counsel and it did so in two working days, there was no deliberate misconduct).

399. See *United States v. Romero*, 585 F.2d 391, 399 (9th Cir. 1978) (indictment not invalid merely because prosecutor failed to present exculpatory evidence to grand jury, since evidence did not clearly negate guilt or undermine authority of grand jury to act); *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978) (grand jury need not be advised of all matters bearing on credibility of witnesses; dismissal of indictment required only in cases of flagrant abuse).

400. 580 F.2d 365 (9th Cir. 1978).

duct.⁴⁰¹

The United States Attorney has a duty to prosecute for all offenses against the United States.⁴⁰² This power permits broad discretion in determining which cases to file.⁴⁰³ The Ninth Circuit has held that the doctrine of separation of powers precludes judicial interference with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be "arbitrary, capricious, and violative of due process."⁴⁰⁴ Indictment on a more serious charge after an accused has exercised a procedural right places a heavy burden on the prosecution to show that the additional charges are not vindictive in nature.⁴⁰⁵

The Ninth Circuit, in *United States v. Allsup*,⁴⁰⁶ found this heavy burden satisfied. Allsup charged prosecutorial vindictiveness when he was indicted on a gun charge after he refused to plea bargain his prior prosecution for bank robbery. The Ninth Circuit, relying on the recent Supreme Court decision in *Bordenkircher v. Hayes*,⁴⁰⁷ reaffirmed its po-

401. *Id.* at 367. *Accord*, *United States v. Serlin*, 538 F.2d 737, 749 (7th Cir. 1976); *United States v. Crow Dog*, 532 F.2d 1182, 1196-97 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); *United States v. Acosta*, 526 F.2d 670, 674 (5th Cir.), *cert. denied*, 426 U.S. 920 (1976). *Contra*, *United States v. McCord*, 509 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975); *United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974).

402. 28 U.S.C. § 547 (1976).

403. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("Executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case."); *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976) (defendant not denied due process by government's refusal of immunity to witness).

404. *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir. 1978) (court has no power to dismiss indictment on grounds it violated Justice Department internal policy). *See also* *United States v. Chavez*, 566 F.2d 81 (9th Cir. 1977) (federal court has no power to determine if internal policy of Attorney General's office is violated). *But see* *United States v. Mikka*, 586 F.2d 152 (9th Cir. 1978), where the court found that the previous state prosecution of defendant and the later federal prosecution lacked the identity necessary to invoke the petite policy of the Department of Justice, which states that no federal case should be prosecuted when there has been a state prosecution for the same act or acts, absent compelling federal reasons.

405. *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976) (defendant was initially arraigned on a misdemeanor charge of unlawful entry into the United States, but was reindicted on felony charges of unlawful entry after he refused to waive his right to be tried by a judge and a jury; sufficient appearance of vindictiveness to place heavy burden on prosecution to justify the increased charge).

The concept of retaliatory prosecution was examined in *North Carolina v. Pearce*, 395 U.S. 711 (1969). The *Pearce* court held that due process prohibits a judge from increasing a sentence in retaliation for defendant's exercise of his statutory right to challenge his original conviction. *Id.* at 725. This principle was extended to deter prosecutorial vindictiveness in *Blackledge v. Perry*, 417 U.S. 21, 28 (1974).

406. 573 F.2d 1141 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978).

407. 434 U.S. 357 (1978) (Supreme Court held there was no violation of due process clause of the fourteenth amendment when prosecutor explicitly warned defendant in plea

sition that the prosecution, as part of the plea bargaining process, can use potential charges against the defendant as a bargaining tool.⁴⁰⁸ Thus, when the subsequent charge is part of the plea bargaining process, and a failure to plea bargain results in the actual filing of that charge, there is no prosecutorial misconduct.

In *United States v. Groves*,⁴⁰⁹ the Ninth Circuit failed to find a reason for the defendant's reindictment on a more severe charge. In *Groves*, after a plea bargain was struck and the negotiated charges filed, the defendant exercised a procedural right.⁴¹⁰ The prosecution then filed another more serious indictment against the defendant. The Ninth Circuit held that a manifest appearance of vindictiveness, rather than vindictiveness in fact, was sufficient grounds for reversal of the conviction and dismissal of the indictment.⁴¹¹ The defendant in *Groves* was arrested pursuant to an investigation for marijuana trafficking between California and Canada by agents of the Drug Enforcement Administration. The defendant, while plea bargaining, supplied the name and address of the principal drug supplier, but refused to cooperate further out of fear for his life. The negotiations for plea bargaining were completed and the defendant was then charged with cocaine possession. Eight days after he moved for a dismissal of the cocaine charge under the Speedy Trial Act,⁴¹² the prosecution filed a felony indictment against him for conspiracy to distribute marijuana.⁴¹³ Reversing the district court's ruling that there was no vindictiveness, the Ninth Circuit found that the "coincidence of events presents overwhelming circumstantial evidence" that the indictment was filed in retaliation for appellant's assertion of his procedural right to use the Speedy Trial

bargaining that if he did not plead guilty on pending charges the government would seek another indictment for more serious offense).

408. 573 F.2d at 1143.

409. 571 F.2d 450 (9th Cir. 1978).

410. The defendant moved for dismissal under the Speedy Trial Act, 18 U.S.C. § 1361(b) (1970). 571 F.2d at 452.

411. 571 F.2d at 453 (citing *United States v. DeMarco*, 550 F.2d 1224 (9th Cir. 1977), *cert. denied*, 434 U.S. 827 (1978) (apprehension and appearance of vindictiveness are sufficient to place heavy burden on prosecutor)).

412. 18 U.S.C. § 3161(b) (1970).

413. The appellant had informed the government before any charges were filed that he would furnish only one name and address. The government had all the information relating to the marijuana charge the same day the cocaine charge was filed. Although the government maintained that the new charges were filed because the defendant failed to cooperate, the record showed that the government did not rely on any promise by the defendant to furnish further information. The court concluded that the government brought charges in retaliation for the appellant's exercise of his statutory rights on the cocaine charges. 571 F.2d at 454.

Act.⁴¹⁴ The court also held that, while one of the factors to consider in questioning vindictiveness is the factual similarity/dissimilarity of the two charges, the fact that the two indictments involved different crimes is not dispositive of the issue.⁴¹⁵

6. Joinder of offenses

Federal Rule of Criminal Procedure 8(b) provides that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or the same series of acts or transactions constituting an offense or offenses.⁴¹⁶ It is insufficient that the acts are of the "same or similar character," as provided in rule 8(a); there must exist a more substantial relationship.⁴¹⁷ Although the purpose of rule 8(b) is to promote trial efficiency, that advantage must be balanced against subjecting the defendant to potential prejudice.⁴¹⁸ In *United States v. Barney*,⁴¹⁹ the joinder of a stolen vehicle charge against two defendants with a perjury charge against one of the two defendants was held to be proper because the underlying facts of both offenses were so intertwined that the same evidence could prove both offenses. Conspiracy will provide the necessary link to satisfy the requirement that the charges against more than one defendant constituted a "series of acts or transactions," but the government must use conspiracy in good faith and not merely to bypass the requirements of the rules of joinder.⁴²⁰

414. *Id.* at 453.

415. *Id.* at 454.

416. FED. R. CRIM. P. 8(b).

417. *United States v. Satterfield*, 548 F.2d 1341, 1344-45 (9th Cir. 1977) (when appellant involved in only two of five similar bank robberies with which co-defendant charged, joinder improper and prejudicial because most evidence adduced at trial related to robberies in which appellant was not involved).

418. *United States v. Martin*, 567 F.2d 849, 853 (9th Cir. 1977) (joinder of defendant charged with five counts of indictment with co-defendant charged with ten counts was improper, but any error was harmless). See *United States v. Olander*, 584 F.2d 876 (9th Cir. 1978) (where two defendants, charged with violating court order against fishing in violation of treaty rights, were together fishing in one boat, there was no error in trying the two defendants together).

419. 568 F.2d 134 (9th Cir.), *cert. denied*, 435 U.S. 955 (1978).

420. *Baker v. United States*, 393 F.2d 604 (9th Cir.), *cert. denied*, 393 U.S. 836 (1968) (where substantive counts and the conspiracy count all arose out of the same transaction joinder was permissible). *Accord*, *United States v. Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974); 1 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 144 (1969). See *United States v. Adams*, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) (government acted in good faith in bringing conspiracy charge against both defendants).

7. Delay

The due process clause of the fifth amendment protects against pre-indictment delay that creates substantial prejudice to a defendant's rights to a fair trial and was purposely designed to give the prosecution a tactical advantage over the accused.⁴²¹ In addition to the constitutional protection, Federal Rule of Criminal Procedure 48(b) provides for discretionary dismissal of an indictment if there is unnecessary delay in presenting the charge to the grand jury or in bringing the defendant to trial.⁴²² In *United States v. Jernigan*,⁴²³ the Ninth Circuit found that there was deliberate delay in arresting the defendant, thereby preventing him from going before a magistrate, having bail set and being released. Since no prejudice to the defendant could be shown from the delay, dismissing the indictment and vacating conviction was considered too drastic a remedy, and the court upheld the conviction.⁴²⁴

8. Amendments and variances

Because a felony defendant in federal court has a fifth amendment right to be charged only by indictment,⁴²⁵ neither the prosecutor nor the court may materially amend an indictment.⁴²⁶ A trial judge, however, may amend the indictment by withdrawing a portion of the

421. U.S. CONST. amend. V. See *United States v. Marion*, 404 U.S. 307, 324 (1971) (defendant failed to show prosecutorial delay prejudiced right to a fair trial, or that delay was designed to gain tactical advantage, and therefore due process claims were speculative and premature); *United States v. Barney*, 568 F.2d 134, 139 (9th Cir.), cert. denied, 435 U.S. 955 (1978) (government's delay in filing indictment in transporting stolen vehicle charge did not deny defendant due process where no prejudice and no intentional delay shown); *United States v. Manning*, 509 F.2d 1230, 1234 (9th Cir. 1974), cert. denied, 423 U.S. 824 (1975) (due process rights not violated by three and one-half year delay between acts constituting conspiracy and indictment, when defendant failed to show prejudice, harassment, or an intentional ploy by prosecution to gain a tactical advantage).

422. FED. R. CRIM. P. 48(b). See *United States v. Simmons*, 536 F.2d 827, 832-38 (9th Cir.), cert. denied, 429 U.S. 854 (1976), for standards to evaluate the propriety of dismissal with prejudice under rule 48(b) for delay in bringing a case to trial after indictment. Dismissal must be exercised with caution, and only after a warning to the prosecution that further delay will result in dismissal of the indictment. See also *United States v. Charnay*, 577 F.2d 81 (9th Cir. 1978), where the Ninth Circuit upheld the trial court's dismissal of the indictment after the trial court had given a clear and express warning that the indictment would be dismissed if the prosecutor was not prepared.

423. 582 F.2d 1211 (9th Cir.), cert. denied, 439 U.S. 991 (1978).

424. *Id.* at 1214. The court added, however, that repetition of this type of behavior would lead to dismissal of an indictment in a future case. *Id.*

425. U.S. CONST. amend V.

426. *United States v. Dawson*, 516 F.2d 796, 804 (9th Cir.), cert. denied, 423 U.S. 855 (1975) (withdrawal of part of the indictment from the jury's consideration did not materially alter or broaden the essential nature of the offense charged).

charge, deleting surplusage, or making a purely formal change by instructions to the jury if the offense charged remains the same and the defendant has not been prejudiced.⁴²⁷

A material variance between the indictment and the proof at trial may result in reversal if the result is prejudicial to the defendant's substantive rights.⁴²⁸ The Ninth Circuit has interpreted these rights to include only: (1) preventing the defendant from presenting his defense properly; (2) taking him unfairly by surprise; or (3) exposing him to double jeopardy.⁴²⁹

While an amendment to an indictment is a change in the indictment itself, the Ninth Circuit recognizes that a variance between the indictment and the proof at trial may result in a constructive amendment.⁴³⁰

C. Guilty Pleas

A defendant's plea of guilty operates as a waiver of his constitutional rights to a trial by jury, confrontation with his accusers, and the privilege against self-incrimination.⁴³¹ A plea of guilty is an explicit admission of all the elements of the offense charged and is itself a conviction.⁴³² Once the accused has admitted his guilt, any constitutional challenges that would have prevented the prosecution from proving factual guilt become irrelevant, but he does not waive other constitutional claims that would have prevented conviction even if factual guilt were established.⁴³³ Applying this reasoning in *Launius v.*

427. *United States v. Abascal*, 564 F.2d 821, 832-33 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978) (trial judge upheld in striking the word "import" from charge of conspiracy to "import, distribute and possess" LSD because there was no need to establish importation to convict for possession and distribution).

428. *Berger v. United States*, 295 U.S. 78, 82 (1935) (substantial rights include right to be definitely informed of charge so as to prevent surprise at trial and right to insure freedom from multiple prosecutions for same offense; variance fatal only if it affects substantial right).

429. *United States v. Anderson*, 532 F.2d 1218, 1227 (9th Cir.), *cert. denied*, 429 U.S. 839 (1976) (jury instructions did not operate to amend the indictment).

430. *United States v. Lyman*, 592 F.2d 496 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2864 (1979) (no constructive amendment occurred when charges which were not proved were surplusage and did not support conviction for conspiracy).

431. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (guilty plea is a waiver of jury trial, privilege against self-incrimination, and right to confront accusers).

432. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). *See Forstner v. INS*, 579 F.2d 506, 508 (9th Cir. 1978), where the Ninth Circuit held that even if a conviction after a guilty plea could at some future time be expunged from the record under an Oregon law, it did not render it any less a final conviction.

433. *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975) (guilty plea did not bar defendant's claim that his indictment violated the double jeopardy clause).

United States,⁴³⁴ the Ninth Circuit held that the appellants' guilty pleas to two counts of conspiracy (when in fact there was only one conspiracy) did not result in a waiver of their right to challenge the consecutive sentences imposed for the two counts as a violation of the double jeopardy clause.⁴³⁵

The use of the "conditional guilty plea," wherein the defendant is allowed to plead guilty and yet preserve his right to appeal certain issues, was strongly rejected by the Ninth Circuit in 1978. In *United States v. Benson*,⁴³⁶ the court held that its use was grossly inconsistent with the Supreme Court's rulings in the *Brady*⁴³⁷ line of cases.⁴³⁸

Before accepting a guilty plea, the court must be satisfied that the accused makes the plea knowingly, voluntarily, and with an understanding of the consequences of the rights waived.⁴³⁹ When a guilty plea is entered as a result of a plea bargain with the prosecutor, and the prosecutor fails to keep his bargain, the plea is considered involuntary and the court can allow the defendant to withdraw his plea or require specific performance of the promise inducing the plea.⁴⁴⁰ If the plea is

434. 575 F.2d 770 (9th Cir. 1978).

435. *Id.* at 771.

436. 579 F.2d 508 (9th Cir. 1978).

437. In *Tollett v. Henderson*, 411 U.S. 258 (1973), the Supreme Court summarized the essence of its holdings in *Parker v. North Carolina*, 397 U.S. 790 (1970), *McMann v. Richardson*, 397 U.S. 759 (1970), and *Brady v. United States*, 397 U.S. 742 (1970), as follows:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

411 U.S. at 267.

438. 579 F.2d at 511.

439. *Boykin v. Alabama*, 395 U.S. 238, 242, 243 n.5, 244 (1969).

440. *Santobello v. New York*, 404 U.S. 257, 261-62 (1972) (defendant pled guilty after agreement with prosecutor that he would make no recommendation as to sentence; prosecutor failed in his promise and Supreme Court vacated conviction and remanded for the court to either allow withdrawal of plea or specific performance of the agreement by prosecutor). See *Stone v. Cardwell*, 575 F.2d 724, 726 (9th Cir. 1978), where in a habeas corpus proceeding the court held that the due process clause, which requires that the guilty plea be knowingly and voluntarily made, takes precedence over state law which did not allow review of the trial court's ruling denying petitioner's motion to withdraw guilty plea. See *Lopez v. United States*, No. 76-3674 (9th Cir. Dec. 6, 1978), where the defendant entered a guilty plea in reliance on misinformation that the court could impose a concurrent sentence for cocaine possession with any sentence received for violation of his parole. Since the misrepresentation was remedied by the cooperation of the parole board, which agreed to have the sentences run concurrently, the court denied post conviction relief. Cf. *Gardner v. Pogue*, 568 F.2d 648 (9th Cir. 1978) (court denied federal habeas corpus relief when record of state

entered on the erroneous advice of the accused's counsel that he may plead and still preserve issues for direct appeal, the defendant can attack the voluntary and intelligent character of his plea.⁴⁴¹

The court must also satisfy the requirements of Federal Rule of Criminal Procedure 11 governing the acceptance of guilty pleas; if the requirements are not met, the defendant must be given the opportunity to plead anew.⁴⁴² Rule 11(c) requires the judge to inform the defendant of the nature of the charges against him, the minimum and maximum penalties provided by law, and other specified consequences of the plea.⁴⁴³ In *United States v. Hamilton*,⁴⁴⁴ the court held that this rule did not require that the judge specifically inform the defendant of the possibility of consecutive sentences where the defendant was advised of the possible sentences as to each of the two counts and could reasonably conclude there was a possibility of consecutive sentencing.⁴⁴⁵ The court held further that the requirement of informing the defendant of the penalties does not necessarily mean that the words literally must come from the judge's lips, as long as the judge ensures that the defendant understands the possible penalties.⁴⁴⁶ This decision is consistent with the Ninth Circuit's previous position that compliance with rule 11 does not require adherence to formal procedures⁴⁴⁷ or ritualistic performances,⁴⁴⁸ so long as the record shows the defendant voluntarily and knowingly pled.

The Ninth Circuit, however, has adhered strictly to the rule that when a statute requires a mandatory parole term appended to the sen-

proceedings supported state determination that petitioner's guilty plea was voluntary, knowing, and uncoerced).

441. See *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973) (for plea to be subject to collateral attack because of erroneous advice of counsel, accused must show that advice of attorney fell below minimum standards for competence demanded of attorneys in criminal cases).

442. *McCarthy v. United States*, 394 U.S. 459, 471-72 (1969) (plea vacated because of noncompliance with rule 11).

443. FED. R. CRIM. P. 11(c).

444. 568 F.2d 1302 (9th Cir.), *cert. denied*, 436 U.S. 944 (1978).

445. *Id.* at 1306.

446. *Id.* The judge informed the defendant of all rule 11 matters except penalties, and then asked if the defendant understood the penalties as explained by the prosecutor.

447. *Fruchtman v. Kenton*, 531 F.2d 946 (9th Cir.), *cert. denied*, 429 U.S. 895 (1976) (court's failure to specifically advise accused that guilty plea constituted a waiver of rights to confrontation and compulsory process not violative of rule 11).

448. *Guthrie v. United States*, 517 F.2d 416, 418 (9th Cir. 1975) (rule does not require needless colloquy and time consuming padding of record when record shows plea voluntary and supported by fact); *United States v. Youpee*, 419 F.2d 1340, 1344 (9th Cir. 1969) (no ritual is prescribed by rule 11).

tence, the accused must be so informed.⁴⁴⁹ In *United States v. Del Prete*,⁴⁵⁰ the court held that, while the defendant had been advised of the existence of the special parole term, the court had failed to explain adequately that if any term of imprisonment were imposed, the special parole term of three years or more would be required in addition to the prison term.

Rule 11 requires additionally that the court be satisfied that the plea has a factual basis before judgment can be entered on the plea.⁴⁵¹ In *United States v. Herrell*,⁴⁵² a felon charged with possession of firearms challenged the validity of his previous grand theft conviction because the record showed no factual basis for his guilty plea, as required by an Arizona law similar to rule 11(f). In affirming his conviction, the Ninth Circuit held that his grand theft conviction had not been challenged prior to his being found in possession of the firearms, and, because his appeal was based on a violation of a statute and not constitutional grounds, it was unavailing.⁴⁵³

D. Discovery

1. Jencks Act

Rule 16 of the Federal Rules of Criminal Procedure provides for discovery to the federal criminal defendant of his own pre-trial statements, confession, grand jury testimony, prior criminal record, and the results of medical or scientific tests.⁴⁵⁴ It also provides that the defendant can inspect and copy any documents or tangible evidence in the government's possession that are material to the preparation of his defense or are intended for use as evidence by the government.⁴⁵⁵ The

449. *Bunker v. Wise*, 550 F.2d 1155 (9th Cir. 1977) (court gave retroactive effect to *Harris* decision); *United States v. Harris*, 534 F.2d 141 (9th Cir. 1976) (defendants who plead guilty must be advised that mandatory special parole term will be appended to sentence).

450. 567 F.2d 928 (9th Cir. 1978).

451. FED. R. CRIM. P. 11(f).

452. 588 F.2d 711 (9th Cir. 1978).

453. *Id.* at 713.

454. FED. R. CRIM. P. 16. *But see* *United States v. Emery*, 591 F.2d 1266 (9th Cir. 1978) (prosecutors with "open file" policies for discovery did not violate policy and defendant not unduly prejudiced when, after defense counsel examined file, additional report was prepared and added to the file without notifying accused); *United States v. Rinn*, 586 F.2d 113, 120 (9th Cir. 1978) (government's failure to disclose pretrial inculpatory statement made by defendant in presence of two government agents was not reversible error when defendant was not under interrogation and was unaware the other participants were government agents).

455. FED. R. CRIM. P. 16. *But see* *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978), where the Ninth Circuit reversed a contempt conviction for failure to comply with discovery order where the district court had no grand jury investigation pending and no charges were pending.

government does not have to disclose a list of witnesses⁴⁵⁶ or the contents of statements made by its witnesses prior to trial. The Jencks Act,⁴⁵⁷ however, provides that once a government witness has testified at trial, the defendant is entitled to inspect any pre-trial statements made by the witness to aid in cross-examination.⁴⁵⁸

The Ninth Circuit has ruled that rough notes taken during interviews with potential witnesses during the course of an investigation are discoverable materials and, therefore, must be preserved.⁴⁵⁹ In *United States v. Shields*,⁴⁶⁰ however, the court refused to apply the holding retroactively in the absence of some showing of prejudice.

In *Goldberg v. United States*,⁴⁶¹ the Supreme Court held that notes taken by government attorneys while interviewing their witnesses may be discovered by the defendant if they are "truly the statement of the witness—that is, a statement written and signed or otherwise adopted or approved by him or a substantially verbatim recording of an oral statement."⁴⁶² This requirement is not satisfied unless a lawyer reads

456. *United States v. Thompson*, 493 F.2d 305, 309 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974). See *United States v. Rinn*, 586 F.2d 113 (9th Cir. 1978) (although court did not reach issue of obligation to inform, entire criminal record of government witness was supplied to defendant even though government not obliged to furnish it); *United States v. Seymour*, 576 F.2d 1345, 1348-49 (9th Cir.), *cert. denied*, 439 U.S. 857 (1978) (trial court's action ordering parties to exchange lists of witnesses, summaries of their testimonies, and all trial exhibits would not be sanctioned by court of appeals, but due to defendant's minimal compliance, his failure to object, and overwhelming evidence of guilt, defendant was not prejudiced and any error was harmless).

457. 18 U.S.C. § 3500 (1976). The Jencks Act grew out of *Jencks v. United States*, 353 U.S. 657, 668-72 (1972), in which the Supreme Court held that after a prosecution witness had testified at trial, any previous statements made by the witness relating to this testimony were to be turned over to the defendant for his inspection and use in cross-examination or impeachment of the witness.

458. See *United States v. Dreitzler*, 577 F.2d 539, 553 (9th Cir. 1978) (defendant not prejudiced by trial court's refusal to disclose names of expert witnesses and their test results since the witnesses were not called at trial); *United States v. Lyman*, 592 F.2d 496 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2864 (1979), where it was found there was no merit to a contention that the government violated the Jencks Act when the government in fact tendered the notes for defense inspection but they were not accepted nor utilized by the defense.

459. *United States v. Harris*, 543 F.2d 1247, 1247-48 (9th Cir. 1976) (court rejected the government's argument that destruction of notes was proper because agents had incorporated contents into a formal report).

460. 571 F.2d 1115, 1119 (9th Cir. 1978) (defendant failed to show any prejudice resulting from destruction of notes).

461. 425 U.S. 94 (1976).

462. *Id.* at 102 n.5 (emphasis in original). 18 U.S.C. § 3500(e)(1) (1976) defines "statement" as "a written statement made by said witness and signed or otherwise adopted or approved by him." See *United States v. Adams*, 581 F.2d 193, 199 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) (court refused to overturn the district court's ruling that the unreleased

back, or the witness himself reads, what the lawyer has written.⁴⁶³ The *Goldberg* court emphasized that the determination of whether notes constitute a "statement" within the statutory definition must be made initially by the trial court.⁴⁶⁴ The court of appeals may overturn those findings only if they are clearly erroneous.⁴⁶⁵

The district court found on remand⁴⁶⁶ that the writings were not producible under the Jencks Act, and the defendant appealed. The Ninth Circuit, in *United States v. Goldberg*,⁴⁶⁷ affirmed the district court's ruling that the attorney's notes had not been adopted or approved by the defendant and therefore were not "statements" of the witness for discovery purposes. The court further held that the government was not required to produce the witnesses' personal notes which were not in the government's possession at the time of the Jencks motion and of which the government was unaware.⁴⁶⁸

2. Prosecutor's duty to disclose

The Supreme Court also has recognized that in some instances a refusal of discovery to a defendant is a denial of due process,⁴⁶⁹ and, in certain cases, the prosecutor may have an affirmative duty to disclose to the defendant evidence that might exculpate him.⁴⁷⁰ In *Brady v. Maryland*,⁴⁷¹ the Supreme Court ruled that "suppression by the prose-

statements were not adopted by the witness when there had only been discussions of the general substance of what the witness said).

463. 425 U.S. at 110 n.19.

464. *Id.* at 111.

465. *Campbell v. United States*, 373 U.S. 487, 493-95 (1963).

466. 435 F. Supp. 1172, 1177 (D. Ariz. 1977), *aff'd*, 582 F.2d 483 (9th Cir. 1978).

467. 582 F.2d 483 (9th Cir. 1978).

468. *Id.* at 487. *Goldberg* was convicted of fourteen counts of mail fraud. The government's case against the defendant consisted primarily of the testimony of Newman, a fellow employee. Prior to trial, the government delivered to *Goldberg* a copy of Newman's testimony before the grand jury and a memorandum of an interview of Newman by two government attorneys. The memorandum indicated the lawyers were going to conduct further interviews with Newman. During the trial, Newman disclosed that he did have subsequent meetings with the attorneys and the defendant moved for a copy of the attorneys' notes. When the notes were turned over to the court, it was discovered that the government had 40 pages of notes by Newman himself of which they previously had been unaware. *Id.* at 484-86.

469. *Cicenia v. Lagay*, 357 U.S. 504, 510-11 (1958), *overruled on other grounds*, 384 U.S. 436 (1966) (denial of defendant's motion to see his written confession was not a denial of due process in absence of showing of any prejudice).

470. *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) (prosecutor has duty to disclose when he knows his witness perjured himself); *Alcorta v. Texas*, 355 U.S. 28, 30, 32 (1957) (prosecution has duty to correct misleading impression created by his witness).

471. 373 U.S. 83 (1963).

cution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."⁴⁷² The test of whether the evidence is material is whether the requested evidence would affect the outcome of the trial,⁴⁷³ and the Ninth Circuit interprets this test as synonymous with the harmless error standard.⁴⁷⁴ If the request is couched in such general terms as for "all *Brady* material" or "anything exculpatory," however, it is the equivalent of no request at all, and the court may deny the motion.⁴⁷⁵

A mere delay in disclosure of *Brady* material, however, will warrant reversal only if the "lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his Constitutionally guaranteed fair trial."⁴⁷⁶ In *United States v. Shelton*,⁴⁷⁷ for example, the appellant claimed that his conviction for filing a false income tax return should be reversed because the prosecution delayed in disclosing over 500 pages of alleged *Brady* material until the eve of trial, and failed to release an additional 1900 pages of *Brady* material until after the trial.

The Ninth Circuit found the failure to disclose material until the eve of trial insufficient to prejudice the defendant's preparation or presentation of his case.⁴⁷⁸ The *Shelton* court further found a portion of the material released after the trial to be merely cumulative or collateral in effect, and therefore non-prejudicial to the defense.⁴⁷⁹ Although the Ninth Circuit found the remaining documents to be material in the *Brady* sense, the request for new trial was rejected since the Government had made a good faith effort to locate the materials prior to trial

472. *Id.* at 87.

473. *United States v. Agurs*, 427 U.S. 97, 106-07 (1976) (Court distinguished specific requests in cases like *Brady* from general requests for exculpatory evidence).

474. *United States v. Goldberg*, 582 F.2d 483, 490 (9th Cir. 1978) (the usefulness of the notes related to the impeachment of the witness Newman, not to the guilt or innocence of the defendant; therefore, if there was error in excluding them, it was harmless beyond reasonable doubt).

475. *United States v. Weiner*, 578 F.2d 757, 767 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (in securities fraud prosecution it was not error to deny broad motion for all SEC transcripts and statements and FBI interviews).

476. *United States v. Miller*, 529 F.2d 1125, 1128 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976).

477. 588 F.2d 1242 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2822 (1979).

478. *Id.* at 1247.

479. Judge Ely, however, rejected the majority position that the error was harmless beyond a reasonable doubt. Instead, Judge Ely reasoned that the conviction should be reversed because the government had been lax and had failed to seriously undertake their duty to produce the evidence requested. *Id.* at 1252-53 (Ely, J., dissenting).

and the defense had exhibited a lack of diligence in attempting to obtain the evidence independently.⁴⁸⁰ Emphasizing the significance of a diligent defense attempt to obtain *Brady* material, the Ninth Circuit agreed with the Seventh Circuit that "a failure to exercise diligence can be so obviously bordering on gamesmanship as to place the evidence constructively in the category of non-newly discovered."⁴⁸¹

3. Depositions

The taking of depositions in criminal cases is limited to the purpose of preserving testimony under exceptional circumstances, such as when a witness will be unable to attend the trial.⁴⁸² Depositions, therefore, are generally disallowed merely for discovery purposes.⁴⁸³ If the defendant does not plead or prove the unavailability of the witness at trial, it is within the discretion of the court to deny the motion for a deposition.⁴⁸⁴

4. Pre-sentence reports

The pre-sentence report is usually made available on request to the defense counsel prior to sentencing so that the defendant can contest any alleged factual inaccuracies.⁴⁸⁵ The disclosure of the report, however, is discretionary and may be withheld if its disclosure would adversely affect the defendant or other persons.⁴⁸⁶ The Ninth Circuit has held that in noncapital cases, the defendant's right to confrontation is not violated when the court withholds information that might disrupt an existing police investigation, and the judge indicates that he has not relied on the withheld portion.⁴⁸⁷

480. *Id.* at 1249 & n.12.

481. *Id.* at 1250 (quoting *United States v. Hedgeman*, 564 F.2d 763, 768 (7th Cir. 1977)).

482. *United States v. Singleton*, 460 F.2d 1148, 1154 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973). FED. R. CRIM. P. 15; 18 U.S.C. § 3503(a) (1978). Motions under rule 15 are considered under the same legal standard as § 3503(a).

483. *See In re United States*, 348 F.2d 624, 626 (1st Cir. 1965) (defendant not allowed to take deposition on bare assertion that witness may not be at trial).

484. *United States v. Rich*, 580 F.2d 929, 933-34 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (defendant who sought deposition failed to plead or prove unavailability of witnesses). *See United States v. Schmidt*, 573 F.2d 1057, 1066 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978) (Ninth Circuit upheld as not clearly erroneous the finding of the trial court that defendant was not denied his right to take depositions).

485. FED. R. CRIM. P. 32(c)(3). *See United States v. Perri*, 513 F.2d 572, 575 (9th Cir. 1972), in which the court held that fundamental fairness required that the defendant be told of the substance of all information which adversely affects his interests.

486. FED. R. CRIM. P. 32(c)(3)(A).

487. *Pavao v. Cardwell*, 583 F.2d 1075, 1077 (9th Cir. 1978). The defendant was convicted of assault with a deadly weapon. Portions of the presentence report were withheld on

In *United States v. Dubrofsky*,⁴⁸⁸ the Ninth Circuit seemed to go one step further and sanctioned the withholding of information to protect ongoing police investigations when the judge did not rely "exclusively or even compellingly" on the confidential information, but, in addition to the report, relied on information available to the defendant and information gleaned from the trial.⁴⁸⁹

5. Competency reports

The Ninth Circuit, in *United States v. Winn*,⁴⁹⁰ was confronted with the question of a defendant's right to a pre-trial competency report. The court ruled that when a competency hearing is held without the testimony of the reporting psychiatrist or, when a competency hearing is not required, the decision to disclose the report rests with the trial court.⁴⁹¹ While the Federal Rules of Criminal Procedure do not expressly regulate the disclosure of competency reports, the court analogized the exercise of its discretion to withhold these reports to rule 32(c)(3) governing disclosure of pre-sentence reports.⁴⁹²

E. Right to Jury Trial

The United States Constitution guarantees a trial by jury in criminal prosecutions.⁴⁹³ The Supreme Court consistently has held that this right extends only to individuals charged with a serious offense that carries a punishment in excess of six months.⁴⁹⁴ Thus, if there is a pre-trial stipulation that the court will not impose a jail sentence in excess

the ground that they would disrupt an existing police investigation. The court upheld the ruling, distinguishing *Pavao* from *Gardner v. Florida*, 430 U.S. 349 (1977), on the basis that the latter was a death penalty case.

488. 581 F.2d 208 (9th Cir. 1978) (defendant convicted of importing heroin and possession with intent to distribute).

489. The court distinguished this case from *United States v. Perri*, 513 F.2d 572 (9th Cir. 1975), where the judge made it clear that he relied solely on the confidential report in imposing the sentence. 581 F.2d at 214-15. Judge Sneed disagreed with the majority that protection of an existing police investigation was a reason recognized by rule 32(c)(3) for withholding information. He argued that the majority position was contrary to the court's ruling in *Perri*. *Id.* at 215.

490. 577 F.2d 86 (9th Cir. 1978). FED. R. CRIM. P. 12.2(c) governs psychiatric examination of federal criminal defendants and requires that the psychiatrist report only to the court.

491. 577 F.2d at 92. *But see In re Harmon*, 425 F.2d 916, 918 (1st Cir. 1970) (if psychiatrist testifies at a hearing, his report should be available to both prosecutor and defendant as basis for their examination).

492. 577 F.2d at 92. *See* FED. R. CRIM. P. 32(c)(3)(a).

493. U.S. CONST. art. III, § 2, cl. 3; *id.*, amend. VI.

494. *See Baldwin v. New York*, 399 U.S. 66, 72-74 (1970) (not a petty offense for purposes of right to jury trial if defendant subject to more than six months imprisonment).

of six months, the defendant has no right to a jury trial.⁴⁹⁵ Similarly, if the defendant is charged with violating a statute that does not prescribe any specific term of imprisonment, there is no right to a jury trial when the actual sentence imposed is six months or less.⁴⁹⁶

The Federal Rules of Criminal Procedure require a jury of twelve⁴⁹⁷ and a unanimous verdict.⁴⁹⁸ If the jury is unable to reach a unanimous verdict, they may be asked to deliberate further, or they may be discharged.⁴⁹⁹ In *United States v. Lopez*,⁵⁰⁰ after the jury had begun deliberations and had been unable to reach a verdict, the defendant informed the court that she wished to waive her right to a unanimous verdict of twelve jurors and to accept the verdict of ten of the twelve. Following a jury poll, the defendant was found guilty on each count by a vote of ten to two. Reversing her conviction, the Ninth Circuit held that the unanimity required by rule 31 cannot be waived.⁵⁰¹ Although the court did not consider the constitutional implications,⁵⁰² it supported its view by reference to clear language of the rule. The court emphasized that a unanimous verdict requirement has a beneficial effect on the fact-finding process "by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury."⁵⁰³

III. PROCEDURAL RIGHTS OF THE ACCUSED

A. *Right to Counsel*

1. General and statutory

Prior to the initiation of adversary criminal proceedings, the due process clause of the fifth amendment confers a right to counsel for

495. *United States v. Marthaler*, 571 F.2d 1104, 1105 (9th Cir. 1978) (in criminal contempt of court proceedings, pretrial stipulation that trial court would not impose sentence in excess of six months in jail made jury trial unnecessary).

496. *Bloom v. Illinois*, 391 U.S. 194, 211 (1968) (when no penalty is set by legislature, best evidence of actual seriousness of offense is penalty actually imposed).

497. FED. R. CRIM. P. 23.

498. *Id.* 31(a). In *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972), however, the Supreme Court held that less than a unanimous verdict is acceptable in state cases.

499. FED. R. CRIM. P. 31(d).

500. 581 F.2d 1338 (9th Cir. 1978).

501. *Id.* at 1342.

502. The Fifth Circuit, however, in ruling that the right to a unanimous verdict may not be waived, based its ruling on the sixth amendment and rule 31. *Sincox v. United States*, 571 F.2d 876, 878-79 (5th Cir. 1978). The Sixth Circuit reached a similar conclusion based only on rule 31. *Hibdon v. United States*, 204 F.2d 834, 836, 838 (6th Cir. 1953). The Third Circuit has held that unanimity is required based on the Supreme Court dicta in *Apodaca v. Oregon*. See note 498 *supra*. *United States v. Scalzitti*, 578 F.2d 507 (3d Cir. 1978).

503. 581 F.2d at 1341.

those party to criminal investigations.⁵⁰⁴ At the point where such proceedings begin, sixth amendment protections provide additional rights to counsel.⁵⁰⁵ In addition to judicial interpretations of constitutional requirements, Congress has enacted various statutes requiring the appointment of counsel when the accused is subject to governmental sanctions.⁵⁰⁶

The Ninth Circuit in *Jett v. Castaneda*⁵⁰⁷ examined the scope of a section of the Criminal Justice Act.⁵⁰⁸ The Act provides that counsel be furnished to those "for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel."⁵⁰⁹ Upon review of the legislative history of this section of the Act,⁵¹⁰ the court concluded that "Congress used [the term] 'Sixth Amendment' as shorthand for 'constitutional right to counsel,' whatever the specific derivation of the right."⁵¹¹

If no constitutional right to counsel exists, federal statutes may create

504. U.S. CONST. amend. V provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." See *Miranda v. Arizona*, 384 U.S. 436, 470-74 (1966).

505. U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." See *Gerstein v. Pugh*, 420 U.S. 103, 122-23 (1975) (hearing after arrest not requiring adversary proceeding results in no right to counsel); *Ross v. Moffitt*, 417 U.S. 600, 617-18 (1974) (no right to counsel for discretionary appellate review); *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (preliminary hearing for probable cause confers the right to counsel); *Mempa v. Rhay*, 389 U.S. 128, 135-37 (1967) (right to counsel attaches where substantial rights of accused may be affected, e.g., sentencing); *United States v. Wade*, 388 U.S. 218, 226-27 (1967) (right to counsel attaches at post indictment line-up); *White v. Maryland*, 373 U.S. 59, 59-60 (1963) (right to counsel at initial appearance); *Douglas v. California*, 372 U.S. 353, 354-58 (1963) (right to counsel for appeal of right); *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963) (right to counsel at trial); *In re Groban*, 352 U.S. 330, 333 (1957) (no right to counsel at grand jury proceeding).

506. E.g., 18 U.S.C. § 3006A (1976).

507. 578 F.2d 842 (9th Cir. 1978).

508. 18 U.S.C. § 3006A(a)(4) (1976).

509. *Id.*

510. H.R. REP. NO. 91-1546, 91st Cong., 2d Sess. 6, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 3982, 3988.

511. 578 F.2d at 844-45. *Jett* involved the propriety of the appointment of counsel for an inmate who wished to speak with an attorney during the investigation of a fatal stabbing at the prison. Since the suspect's right to counsel in that situation was derived from the fifth amendment right against self-incrimination, it was posited that the "Sixth Amendment" reference in § 3006A provided the basis of the right "whatever the specific derivation of the right." *Id.* In addition, the Ninth Circuit held that absent an "indictment or other charge bringing a defendant before the court, or in the absence of a pending grand jury investigation, a district court has no general supervisory jurisdiction over the course of executive investigations." *Id.*

a right to counsel. In a deportation proceeding, for example, in which there is no constitutional right to counsel,⁵¹² the federal statutory right must be enforced.⁵¹³

The accused's right to counsel, however, is not without limitation.⁵¹⁴ In 1978, for example, the Ninth Circuit found there to be no deprivation of the right to counsel when the defendant's counsel was removed because of a conflict of interest resulting from his representation of a co-defendant who had become a prosecution witness.⁵¹⁵

2. Waiver of the right to counsel

In an effort to "import a greater degree of flexibility and realism in the application of *Miranda*,"⁵¹⁶ the Ninth Circuit recently held that a suspect in a criminal investigation can waive his right to counsel, after asserting the right, but before actually speaking with an attorney.⁵¹⁷ The court's rejection of a per se prohibition of such a waiver followed a host of inconsistent decisions on the waiver issue within the circuit. In formulating its decision in *United States v. Rodriguez-Gastelum*,⁵¹⁸ the court attempted, by drawing from the "spirit of *Mosley*,"⁵¹⁹ to avoid

512. *Castro-Nuno v. INS*, 577 F.2d 577 (9th Cir. 1978) (no sixth amendment right to counsel in deportation proceeding).

513. 8 U.S.C. §§ 1252(b), 1362 provide aliens the privilege of representation in deportation proceedings. *Castro-Nuno v. INS*, 577 F.2d 577 (9th Cir. 1978), involved a deportation hearing where the attorney was present twice, but the hearing was continued at the I.N.A.'s request. At a third hearing, when the attorney representing Castro was absent, the defendant was deported although there was no waiver of counsel. The Ninth Circuit reversed the deportation order on the ground that the trial judge violated the defendant's statutory right to counsel. *Id.* at 579.

514. *See United States v. Rich*, 580 F.2d 929, 933-34 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (federal agent's advice to witnesses that they need not confer with defense counsel did not interfere with defendant's sixth amendment right to counsel or his access to witnesses).

515. *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978) ("While a defendant's choice of counsel should not be subject to unnecessary interference, this right is not unlimited."). *See United States v. Rohl*, 588 F.2d 296 (9th Cir. 1978) (mem.) (representation by two attorneys is permitted on appeal for defendant in forma pauperis, but total compensation may not exceed the amount payable if only one attorney had been appointed).

516. *United States v. Rodriguez-Gastelum*, 569 F.2d 482, 485 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978) (quoting *United States v. Pheaster*, 544 F.2d 353, 368 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977)).

517. *Id.* at 486-88.

518. 569 F.2d 482 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978).

519. *Id.* at 487. *See Michigan v. Mosley*, 423 U.S. 96 (1975); *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court in *Miranda* noted:

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

"imprison[ing] a man in his privileges."⁵²⁰ The Ninth Circuit reasoned that, since the express procedures set down in *Miranda* concerning the right to silence had been modified, the similar language in *Miranda* concerning a defendant's assertion of his right to counsel did not require actual consultation with an attorney before waiver.⁵²¹ While acknowledging that the government bears a greater burden of showing waiver when the right to counsel is asserted than when the right to silence is asserted,⁵²² the court concluded that the traditional waiver analysis provided in *Johnson v. Zerbst*⁵²³ would be sufficient to test the validity of the waiver.⁵²⁴

Additionally, the Ninth Circuit held that statements made to a criminal suspect following the assertion of the right to counsel that can be distinguished from questioning, such as the presentation to him of available evidence, do not conflict with the requirements of *Johnson v. Zerbst*.⁵²⁵ *Rodriguez-Gastelum* provided the basis for several subsequent decisions that rejected claimed sixth amendment violations.⁵²⁶

Id. at 473-74. The Court in *Mosley* allowed the questioning of a suspect who had earlier invoked his right to silence.

520. 569 F.2d at 487.

521. *Id.* at 486. See *Miranda v. Arizona*, 384 U.S. 436 (1966), in which the Court observed:

If, however, [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Id. at 444-45.

522. 569 F.2d at 485 (citing *Brewer v. Williams*, 430 U.S. 387, 405 & n.10 (1977)).

523. 304 U.S. 458 (1938). The *Johnson* Court reasoned:

[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights . . . and . . . we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Id. at 464 (citations omitted).

524. 569 F.2d at 488.

525. *Id.* Judge Goodwin, however, noted that the waiver must be "explicit, initiated by the suspect, and not in any way induced by the interrogators." *Id.* at 489 (Goodwin, J., concurring and dissenting).

526. See *United States v. Newell*, 578 F.2d 827 (9th Cir. 1978) (valid waiver of right to counsel upon signing written waiver following the recitation of military equivalent to *Miranda* warnings); *United States v. Evans*, 575 F.2d 1286 (9th Cir.), *cert. denied*, 439 U.S. 854 (1978) (implied waiver found the day after the assertion of the right to counsel); *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978) (request for attorney, followed by cooperation with D.E.A. agents resulted in waiver of right to counsel). Cf. *United States v. Nixon*, 571 F.2d 1121 (9th Cir. 1978) (government failed to sustain burden of waiver where interrogation followed "hard on the heels of the demand for counsel.").

In *United States v. Evans*,⁵²⁷ for example, illegal aliens were identified as passengers in Evan's car when he attempted to enter a military base. The day after his request to speak to an attorney, he was questioned again by border patrol agents and he made incriminating statements. The court, in reliance on *Rodriguez-Gastelum*, concluded that the government sustained its heavy burden of demonstrating a voluntary waiver.⁵²⁸

3. The right of self-representation

The implied sixth amendment right of self-representation was confirmed for defendants in state prosecutions in *Faretta v. California*.⁵²⁹ The rights incident to the sixth amendment right to counsel, such as confrontation and notice of charges, are said to be guaranteed to the "accused, not counsel."⁵³⁰ The right to self-representation rests on the important value of free choice on which the Constitution is based.⁵³¹ The Ninth Circuit has recognized that a defendant, in waiving his sixth amendment right to counsel, has constitutional as well as statutory justification for insisting upon self-representation.⁵³²

In *Bittaker v. Enomoto*⁵³³ the Ninth Circuit reinstated the fundamental right of self-representation when it held that a state convict was entitled to federal habeas corpus relief because he was denied self-representation, even though the denial had occurred before *Faretta*.⁵³⁴

Satisfaction of the traditional requirements of a knowing and intelligent waiver of the right to counsel is necessary before electing self-rep-

527. 575 F.2d 1286 (9th Cir.), *cert. denied*, 439 U.S. 854 (1978).

528. *Id.* at 1287.

529. 422 U.S. 806 (1975). See *Bittaker v. Enomoto*, 587 F.2d 400, 401 (9th Cir. 1978) (the federal right to self-representation existed in Ninth Circuit prior to *Faretta*).

530. *Faretta v. California*, 422 U.S. 806, 819 (1975).

531. *Id.* at 815 (quoting *Adams v. United States*, 317 U.S. 269, 279-80 (1942)).

532. *Bittaker v. Enomoto*, 587 F.2d 400 (9th Cir. 1978) (denial of right of self-representation alone sufficient to set aside conviction, actual prejudice need not be shown); *United States v. Price*, 474 F.2d 1223, 1227 (9th Cir. 1973) (pre-*Faretta* case holding that defendant need not show prejudice resulting from denial of right of self-representation). But cf. *Badger v. Cardwell*, 587 F.2d 968 (9th Cir. 1978). In *Badger* the Ninth Circuit observed that the right of self-representation is not to be confused with the right of presence. When the defendant represents himself, loses self-control and disrupts the trial, the rights to both presence and self-representation may not be curtailed unless it is also demonstrated that the defendant's presence in the courtroom alone would still be too disruptive. *Id.* at 978-79.

533. 587 F.2d 400 (9th Cir. 1978).

534. *Id.* at 401-02. The court justified its decision in two steps: first, the right of self-representation existed within the Ninth Circuit before *Faretta*, pursuant to *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970); and second, federal courts must apply federal constitutional law in all cases properly before them under the federal habeas corpus statute. 587 F.2d at 402 n.1.

resentation.⁵³⁵ To establish that the waiver meets constitutional requirements to the satisfaction of the trial judge, the defendant should be addressed before trial and on the record informed of the nature of the charge, possible penalties, and the dangers of self-representation.⁵³⁶ Absent such a pre-trial, on-the-record finding of an intelligent and knowing waiver, a conviction may be reversed.⁵³⁷

The *Faretta* right to forego representation of counsel does not, however, extend to a right to lay representation.⁵³⁸ While expressing a willingness to protect the accused's sixth amendment rights, the Ninth Circuit is unwilling to forego the benefits it receives by allowing only qualified attorneys in court.⁵³⁹

4. Effective assistance of counsel

It is implicit within the sixth amendment that counsel will perform at some minimal level of competency and effectiveness.⁵⁴⁰ In *Cooper v. Fitzharris*⁵⁴¹ the Ninth Circuit resolved the uncertainty surrounding the standard by which an attorney's performance is to be judged.⁵⁴² In

535. *Faretta v. California*, 422 U.S. 806, 835 (1975). In *Faretta* the Court explained: Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Id. at 835 (citing *Adams v. United States*, 317 U.S. 269, 279 (1942)). See *United States v. Titus*, 576 F.2d 210, 211 (9th Cir.), *cert. denied*, 439 U.S. 860 (1978) (refusal to retain counsel, failure to fill out financial affidavit to qualify for appointed counsel, and statement of being better able to handle the case than an attorney, deemed waiver of counsel); *United States v. Aponte*, 591 F.2d 1247, (9th Cir. 1978) (conviction for bail jumping reversed when record did not reflect pre-trial waiver by accused of right to counsel).

536. *United States v. Gillings*, 568 F.2d 1307, 1309 (9th Cir. 1978) (*per curiam*) ("me too" uttered by a co-defendant is not proper showing of knowing and intelligent waiver of counsel); *United States v. Aponte*, 591 F.2d 1247 (9th Cir. 1978) (requirement of an on-the-record, knowing and intelligent, waiver of counsel before electing self-representation). Compare *Cooley v. United States*, 501 F.2d 1249, 1252 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975) (failure to obtain an on-the-record waiver does not require reversal) with *United States v. Dujanovic*, 486 F.2d 182, 186-87 (9th Cir. 1973) (requirement of an on-the-record intelligent waiver must be met).

537. *United States v. Aponte*, 591 F.2d 1247 (9th Cir. 1978) (the specific finding of mental competency to stand trial should be distinguished from knowing and intelligent waiver of counsel).

538. *United States v. Wright*, 568 F.2d 142, 143 (9th Cir. 1978).

539. *Id.*; *United States v. Marthaler*, 571 F.2d 1104, 1105 (9th Cir. 1978) (*per curiam*) (criminal contempt charge may lie against non-lawyer representing defendants in civil cases).

540. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

541. 586 F.2d 1325 (9th Cir. 1978) (*en banc*) (the appropriate standard is whether trial counsel failed to render reasonably competent and effective assistance).

542. *Id.* at 1328.

Cooper the Ninth Circuit rejected the traditional performance standard that required counsel's performance to be so poor as to reduce the trial to a "farce or mockery of justice."⁵⁴³ The Ninth Circuit held instead that the sixth amendment requires that "persons accused of crime be afforded reasonably competent and effective representation."⁵⁴⁴ While acknowledging that particularization of the "elements of the minimal performance to be expected of counsel . . . would serve to enhance the objectivity of the general standard,"⁵⁴⁵ the *Cooper* court chose to refrain from enumerating such a checklist and noted that such matters "should be left to the good sense and discretion of the trial courts."⁵⁴⁶

The majority also concluded that when such a claim is based on "specific acts and omission of counsel at trial . . . relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct."⁵⁴⁷ The court distinguished this type of claim from those in which the harmless error standard is inapplicable.⁵⁴⁸ The harmless error rule would not apply when the claim is based on failure to either provide counsel or permit counsel to discharge his customary duties.⁵⁴⁹

543. *Id.* at 1327. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (effective assistance is that which is within "range of competence demanded of attorneys" in criminal cases).

544. 586 F.2d at 1330. *United States v. Kazni*, 576 F.2d 238, 242 (9th Cir. 1978). The court in *Kazni* discussed the importance of a fully-developed factual record on the "ineffective" claim, noting that, while such records normally require collateral proceedings pursuant to 28 U.S.C. § 2255 (1976),

if it was evident during the trial that the defendant's legal representation was so inadequate as obviously to deny him his Sixth Amendment right to counsel, or to deny him a fair trial in the due process sense, the failure of the trial court to take note sua sponte of the problem might constitute plain error which may be considered on direct appeal.

576 F.2d at 242.

545. 586 F.2d at 1330.

546. *Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

547. *Id.* at 1331. Judge Hufstедler found the requirement of a showing of prejudice to "impermissibly dilute" the sixth amendment right. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 1334 (Hufstедler, J., concurring and dissenting). See *Chambers v. Maroney*, 399 U.S. 42, 54 (1970) (claims of ineffective assistance of counsel fail absent showing of prejudice).

548. 586 F.2d at 1332. The court noted that in such situations the "evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made." Concerning claims of "ineffective" counsel, the court observed that an analysis of the record would be helpful as the errors occur at trial and are "readily identifiable." *Id.*

549. *E.g.*, *Geders v. United States*, 425 U.S. 80, 86-91 (1976) (defense counsel not permitted to confer with client during overnight mid-trial recess); *Herring v. New York*, 422 U.S. 853, 856-65 (1975) (state statute barring final summation by defense counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (no defense counsel appointed); *Glasser v. United States*, 315 U.S. 60, 76 (1942) (joint representation of co-defendants with conflicting interests).

In *Lowery v. Cardwell*⁵⁵⁰ the Ninth Circuit distinguished counsel's permissible passive refusal to actively pursue a particular line of defense from impermissible direct action that deprives the accused of a fair trial. Following what appeared to defense counsel to be a perjured statement by Lowery, counsel abruptly ceased examination of the defendant and called for a recess. In chambers, in absence of the defendant, the attorney moved to withdraw from the case declaring that he could not state the reason for his motion.⁵⁵¹ This statement was held prejudicial because the trial judge, sitting as the finder of fact, could only rationally conclude that the defendant had suborned perjury.⁵⁵²

Although the Ninth Circuit was sympathetic to the dilemma of counsel seeking to uphold his ethical responsibilities while at the same time rendering a competent defense, the *Lowery* court found the attorney's behavior to be unduly prejudicial.⁵⁵³ While not prescribing the procedure to be followed under such circumstances, the court noted that, when counsel is surprised by his client's perjury, he should not act in such a fashion as to disclose his quandry to the fact finder.⁵⁵⁴ Relying on an alternative due process analysis, rather than on sixth amendment considerations,⁵⁵⁵ the Ninth Circuit concluded that, because the feasibility of withdrawal is unlikely, such action is unnecessary.⁵⁵⁶

550. 575 F.2d 727 (9th Cir. 1978).

551. *Id.* at 729.

552. *Id.* at 730. See *United States v. Dipp*, 581 F.2d 1323 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 841 (1979). In *Dipp*, the defendant claimed that prosecutorial misconduct prevented evidence from reaching defense counsel and led to counsel's failure to advise the defendant to refuse to testify. The court rejected this claim, observing that "[t]he Supreme Court has clearly established that perjury is not a permissible response even when a witness' constitutional rights arguably have been violated." *Id.* at 1327.

553. 575 F.2d at 730.

554. *Id.* at 731 & n.4. The court noted that A.B.A. DISCIPLINARY RULE NO. 7-102(A)(4) provides: "In his representation of a client, a lawyer shall not . . . knowingly use perjured testimony or false evidence." 575 F.2d at 730. Of significant consideration to the court were the A.B.A. Defense Function Standards which, while not on point for the specific factual situation, provide in relevant part:

[T]he lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

A.B.A. DEFENSE FUNCTION STANDARDS § 7.7(c).

555. 575 F.2d at 730. In a concurring opinion, Judge Hufstedler observed that the issue should be based on the sixth amendment right to effective assistance of counsel. Of defense counsel she wrote, "his interest in saving himself from potential violation of the cannons was adverse to his client, and the end product was his abandonment of a diligent defense." *Id.* at 732.

556. *Id.* at 731.

B. Right to Speedy Trial

1. Pre-accusatorial delay

The importance of the sixth amendment right to a speedy trial has in recent years been increasing.⁵⁵⁷ While governmental fiscal policies have forced the criminal justice system to carry an enormous caseload, defendants have borne much of the hardship stemming from such policies.⁵⁵⁸ In response, Congress and the judiciary have attempted to fashion statutory and constitutional means of preventing oppressive delays between arrest and trial.⁵⁵⁹ These remedial measures, however, apply only to situations involving post-arrest delay.⁵⁶⁰ The justification for the difference in treatment lies in the belief that "post-arrest delay is inherently more capable of abuse and oppressive prejudice to the criminal defendant."⁵⁶¹ The protection available to the individual in the pre-indictment setting stems from the applicable statute of limitations, with its built-in protection from "overly stale criminal charges."⁵⁶² Additionally, the due process clause may provide relief in those situations where the pre-indictment delay is "oppressive."⁵⁶³

In order for an accused to sustain a pre-indictment due process speedy trial claim, he must show actual prejudice resulting from the delay.⁵⁶⁴ The focus of the analysis at this point centers on the "reasons

557. *United States v. Pallan*, 571 F.2d 497, 499-501 (9th Cir.), *cert. denied*, 436 U.S. 911 (1978) ("[C]onsiderable attention has been directed to the fact that our criminal justice system is laboring under an ever-burgeoning case load.").

558. *Tucker v. Wolff*, 581 F.2d 235, 237 (9th Cir. 1978) ("A state government's allocation of resources plays a major role in creating congested dockets, and it is unfair to require defendants to bear the entire burden that results from the government's fiscal decisions.").

559. *E.g.*, *Barker v. Wingo*, 407 U.S. 514 (1972) (judicial application of sixth amendment speedy trial provisions); *United States v. Diaz-Alvarado*, 587 F.2d 1002 (9th Cir. 1978) (remedy for violation of 18 U.S.C. § 3164 (1976) (Speedy Trial Act) is pre-trial release, not reversal of conviction or dismissal of indictment); *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978) (defendant's assertion of speedy trial right pursuant to 18 U.S.C. § 3161(b) resulted in new indictment; court reversed based on valid vindictive prosecution claim).

560. *United States v. Marion*, 404 U.S. 307 (1971) (speedy trial provisions of the sixth amendment, as well as FED. R. CRIM. P. 48(b), apply only to post-arrest delays).

561. *United States v. Pallan*, 571 F.2d 497, 499 (9th Cir.), *cert. denied*, 436 U.S. 911 (1978). *See* *United States v. Romero*, 585 F.2d 391, 398 (9th Cir. 1978) (sixth amendment speedy trial right activated at date of federal accusation rather than date of state arrest).

562. *United States v. Ewell*, 383 U.S. 116, 122 (1966).

563. *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (oppressive pre-indictment delay has due process implications).

564. *United States v. Titus*, 576 F.2d 210, 211 (9th Cir.), *cert. denied*, 439 U.S. 860 (1978) ("[A] finding of actual prejudice is a prerequisite to finding a due process violation."). *See* *United States v. Pallan*, 571 F.2d 497, 500 (9th Cir.), *cert. denied*, 436 U.S. 911 (1978) ("[T]o

for the delay as well as the prejudice to the accused."⁵⁶⁵ The intrinsic difficulty in proving such a claim lies in the broad discretion granted the government in determining the point at which actual charges are filed.⁵⁶⁶ A claim of prejudicial delay may prevail when the defendant can show, for example, that the delay was motivated by a desire to harass the accused or to gain a tactical advantage.⁵⁶⁷

In *Arnold v. McCarthy*⁵⁶⁸ the Ninth Circuit reiterated that "the due process test for impermissible pre-accusatorial delay requires a delicate balance of the circumstances of each case."⁵⁶⁹ The prejudice must be "actual and not speculative"⁵⁷⁰ and must be compared with its justifying circumstances.⁵⁷¹ In *United States v. Mays*,⁵⁷² the Ninth Circuit in 1977 identified a third factor that should enter the due process balancing analysis—the length of the delay itself.⁵⁷³ The *Arnold* court, however, rejected this factor from the analysis,⁵⁷⁴ allowing prosecutorial discretion "even if the suspect's defense might be somewhat prejudiced by the delay."⁵⁷⁵

2. Post-accusatorial delay

The sixth amendment right to a speedy trial attaches once a person becomes accused either by or in a formal indictment or information or

block a prosecution on the basis of pre-indictment delay, the defendant must first show actual, nonspeculative prejudice resulting from the delay.").

565. *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

566. *Id.* at 791. See *Hoffa v. United States*, 385 U.S. 293, 310 (1966). The Court in *Hoffa* noted:

There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

567. *United States v. Barney*, 568 F.2d 134, 136 (9th Cir.), *cert. denied*, 435 U.S. 955 (1978) (defendant failed to show intentional delay to gain tactical advantage).

568. 566 F.2d 1377 (9th Cir. 1978).

569. *Id.* at 1383.

570. *Id.* at 1384. The *Arnold* court failed to find actual prejudice even though the delay prevented a potential witness from testifying; more than a mere assertion that the "witness might have been useful" is needed. *Id.* at 1385.

571. *Id.* at 1383.

572. 549 F.2d 670 (9th Cir. 1977).

573. *Id.* at 678.

574. 566 F.2d at 1383-84 n.1. Although the length of the delay had sixth amendment relevance, the court concluded that it was not of great import under a due process analysis. Delay was said to be evidence of possible, rather than actual, prejudice; a primary showing of actual prejudice must be made before the due process analysis begins. *Id.*

575. *Id.* at 1385.

else by the actual restraints imposed by arrest and holding to answer to a criminal charge.⁵⁷⁶ Courts show a greater willingness to find delay at this stage constitutionally impermissible.⁵⁷⁷ In determining whether a delay has extended beyond permissible bounds, the Ninth Circuit will balance four interrelated considerations: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant.⁵⁷⁸ Although the test seems explicit, its application varies depending upon other relevant circumstances.⁵⁷⁹ The gravity of the alleged crime, for example, may be considered in the equation.⁵⁸⁰

In *Tucker v. Wolff*⁵⁸¹ the court suggested that there was some point at which an alleged "congested docket" excuse will become "so unacceptable that by itself it violates the right to a speedy trial."⁵⁸² The Supreme Court in *Barker v. Wingo*⁵⁸³ identified three categories of delay that should be assigned different weight in the analysis: (1) deliberate delay to hamper the defense demands a heavy weight against the government; (2) negligence or overcrowded courts should receive less weight against the government although such reason is the "ultimate responsibility" of the government; (3) valid reasons such as missing witnesses will justify appropriate delay.⁵⁸⁴ The court will also consider the defendant's timely assertion of his right, and this assertion "is entitled to strong evidentiary weight in determining whether defendant is being deprived of the right. . . . [F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."⁵⁸⁵ The defendant is therefore entitled to an evidentiary hearing

576. *United States v. Marion*, 404 U.S. 307, 320 (1971).

577. *Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978) ("[A]lthough standards are still imprecise, the courts have been more willing to find delay to be constitutionally impermissible.").

578. *Barker v. Wingo*, 407 U.S. 514, 530 (1971).

579. *Id.* at 533. *See United States v. Martin*, 587 F.2d 31, 33 (9th Cir. 1978) ("[Defendant] failed to show that the length of the delay was anything more than de minimus; . . . did not explain his failure to assert his speedy trial rights until appeal; and . . . failed to show prejudice . . .").

580. *Barker v. Wingo*, 407 U.S. 514, 531 (1971) ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."). *See United States v. Dreitzler*, 577 F.2d 539 (9th Cir. 1978) (nine-month delay acknowledged as lengthy but allowable because of complex nature of the case).

581. 581 F.2d 235 (9th Cir. 1978).

582. *Id.* at 237. The delay in *Tucker* of 280 days was by itself sufficient to substantiate the claim of denial of a speedy trial. *Id.* at 238.

583. 407 U.S. 514 (1971).

584. *Id.* at 531.

585. *Id.* at 531-32.

regarding his claim of timely assertion of the right.⁵⁸⁶

The prejudice to the defendant is to be viewed in terms of the interests that the right is designed to protect—those comprising a fair trial.⁵⁸⁷ Although prejudice itself is not a strict requirement in order to sustain a claim of violation,⁵⁸⁸ nonprejudice was asserted by the Ninth Circuit this term in denying such claims.⁵⁸⁹

C. Bail

"A bail bond is a contract between the government and the defendant and his surety, the forfeiture of which results in the surety becoming the government's debtor."⁵⁹⁰ The terms of the bond contract are strictly construed⁵⁹¹ and, when there is a breach of a condition of the bond, the court declares a forfeiture.⁵⁹² In 1978 the Ninth Circuit rejected a claim that a bail bond is to be interpreted by reference to applicable state law⁵⁹³ and held that a surety is entitled to notice of forfeiture at the time the "government moves for judgment but not when the defendant fails to appear and his bond is forfeited."⁵⁹⁴

In *United States v. Jernigan*,⁵⁹⁵ the Ninth Circuit cautioned that Fed-

586. See *Tucker v. Wolff*, 581 F.2d 235, 237 (9th Cir. 1978) (public defender's acquiescence to delay required a showing that defendant knowingly consented thereto).

587. These interests include: (1) prevention of oppressive pretrial incarceration; (2) minimization of the anxiety and concern of the accused; and (3) limitation of the possibility that the defense will be impaired. "[T]he most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker v. Wingo*, 407 U.S. at 532.

588. *Moore v. Arizona*, 414 U.S. 25, 26 (1973) (per curiam) (prejudice not essential to claim of violation of speedy trial right).

589. *United States v. Dreitzler*, 577 F.2d 539, 550 (9th Cir. 1978) (assertion of lost or pilfered records, changed testimony by witnesses and police harassment require more than self-serving hearsay statements). See *Blackburn v. United States District Court*, 564 F.2d 332, 334 (9th Cir. 1977) (per curiam) ("No showing has been made that any witness' memory as to given matters has been dimmed or that the presentation of petitioner's defense has been otherwise impaired as a result of this delay.").

590. *United States v. Lujan*, 589 F.2d 436, 438 (9th Cir. 1978).

591. *Id.*

592. *Id.*

593. *United States v. Vera-Estrada*, 577 F.2d 598, 599-600 (9th Cir. 1978). The appellant in *Vera* claimed that CAL. PENAL CODE § 1305(a) (West Supp. 1978), requiring notification of the surety within 30 days of forfeiture, was to be read as an implied term of the bail bond contract. The appellant relied on dictum in *United States v. Gonware*, 415 F.2d 82 (9th Cir. 1969), which indicated that a bail bond is to be interpreted in accordance with applicable state law. The Ninth Circuit in *Vera*, however, expressed its belief that FED. R. CRIM. P. 46(e) is the exclusive rule of procedure governing such matters in federal court. 577 F.2d at 599-600.

594. 577 F.2d at 600. See FED. R. CRIM. P. 46(e).

595. 582 F.2d 1211 (9th Cir.), cert. denied, 439 U.S. 991 (1978).

eral Rule of Criminal Procedure 9(c)(1),⁵⁹⁶ requiring the arresting officer to bring an arrested person promptly before the court to obtain bail, must be satisfied or dismissal of the indictment may be warranted.⁵⁹⁷ In *Jernigan* a warrant was issued on Tuesday, but the arrest was not made until late the following Friday afternoon. The arresting officer did not grant the defendant's request to be taken before a magistrate and have bail set, and the defendant subsequently spent a three-day vacation weekend in jail. While acknowledging the deliberateness of the delay, the court found dismissal of the indictment to be "too drastic a remedy in this case."⁵⁹⁸

IV. CONFESSIONS

*Miranda v. Arizona*⁵⁹⁹ established the basic guidelines to be followed by law enforcement officers when questioning suspects in a custodial setting.⁶⁰⁰ Before the suspect is questioned, he must be told that he has the right to remain silent, that anything he says may be used against him, that he has the right to consult with an attorney prior to any questioning, and that if he desires an attorney and cannot afford one, one will be appointed for him by the court.⁶⁰¹ These warnings were seen by the Court as the only effective way to combat the inherent compulsive atmosphere of custodial questioning.⁶⁰² A defendant's refusal to answer questions after receiving *Miranda* warnings may not be brought to the jury's attention for either substantive or impeachment purposes.⁶⁰³

A. Custodial Questioning

Miranda warnings are required only when the questioning occurs in

596. FED. R. CRIM. P. 9(c)(1).

597. 582 F.2d at 1214.

598. *Id.*

599. 384 U.S. 436 (1966).

600. *Id.* at 444.

601. *Id.* at 444-45, 467-74, 478-79.

602. *Id.* at 445-58, 467-68. If such warnings are not given prior to custodial questioning, the defendant's statements may be used for impeachment purposes only. *Harris v. New York*, 401 U.S. 222 (1971).

603. See *United States v. Weiner*, 578 F.2d 757, 765 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 981 (1978) (prosecutor's reference to defendant's failure to testify held proper, as the government "took no unfair advantage of the situation" for substantive or impeachment purposes); *Douglas v. Cupp*, 578 F.2d 266, 267 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 865 (1979) (question by prosecutor "Did he make any statements to you?" and the answer "No" held to have violated defendant's *Miranda* rights); *United States v. Lorenzo*, 570 F.2d 294, 297 (9th Cir. 1978) (government could not use the fact at trial that defendant had claimed his constitutional privileges at trial) (citing *Miranda v. Arizona*, 384 U.S. 436, 438 n.37 (1966)).

a custodial setting⁶⁰⁴ and not all police questioning is necessarily custodial. For example, volunteered statements,⁶⁰⁵ as well as questioning during an investigatory stop,⁶⁰⁶ do not require *Miranda* warnings, "even though one's freedom of action is inhibited to some degree."⁶⁰⁷ Statements obtained as a result of questioning by foreign authorities who did not give *Miranda* warnings are admissible if found trustworthy, unless the questioning is the result of a joint venture between the foreign and United States authorities.⁶⁰⁸

B. Voluntariness

A confession is not automatically admissible, even if the required *Miranda* warnings are given.⁶⁰⁹ No warning can make an involuntary

604. See, e.g., *United States v. Scharf*, No. 77-3080, slip op. at 4017 (9th Cir. Dec. 7, 1978) (defendant who arrived at his home to find it surrounded by patrol cars and who was questioned in one of those patrol cars by police, held to have been in custody for *Miranda* purposes); *United States v. McCrea*, 583 F.2d 1083, 1086 (9th Cir. 1978) (per curiam) (defendant who was told by officers searching his home pursuant to a search warrant that he was not in custody, and who proceeded to make inculpatory statements, held not to have been in custody as he was free to leave the premises at any time); *United States v. Walker*, 576 F.2d 253, 256 (9th Cir. 1978) (per curiam).

The Ninth Circuit test of custodial interrogation is an objective reasonable man test The factors to be considered are the language used to summon him, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and pressure exerted to detain him. If the person reasonably believes he can not leave freely, he is considered in custody *United States v. Luther*, 521 F.2d 408, 410 (9th Cir. 1975).

605. See, e.g., *Pavao v. Cardwell*, 583 F.2d 1075, 1077 (9th Cir. 1978) (per curiam) (defendant who was ordered out of car and directed to lie on ground after high speed chase and who simultaneously gave statement, without being questioned, was held to have volunteered the statement; *Miranda* warnings, therefore, were not required).

606. The investigatory stop, discussed in *Terry v. Ohio*, 392 U.S. 1 (1968), is a stop made by an officer who has only a reasonable suspicion, rather than probable cause, to suspect that criminal activity is afoot and that the suspect might be involved. *Id.* at 30.

607. *United States v. Collom*, No. 77-1040, slip op. at 1867 (9th Cir. June 15, 1978) (*Miranda* warnings are not required on *Terry*-type stop until probable cause to arrest is found). See also *United States v. Dipp*, 581 F.2d 1323, 1327 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 841 (1979) (failure to give defendant *Miranda* warnings prior to his testifying before the grand jury does not make testimony inadmissible in subsequent perjury trial).

608. *United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978) (questioning of defendant by Mexican authorities was a "joint venture" with American authorities, therefore, *Miranda* warnings were required). Cf. *United States v. Schmidt*, 573 F.2d 1057, 1063 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978) (statements originally obtained by Peruvian authorities and later by DEA agents held to be products of separate operations and therefore admissible).

609. *United States v. Johnson*, No. 77-3808, slip op. at 4121 (9th Cir. Dec. 19, 1978) ("In addition to meeting the requirements set forth in *Miranda*, . . . statements made by a defendant, in order to be admissible, must also be the product of a free and rational choice, as evidenced by the 'totality of the circumstances' surrounding the statements") (citation omitted); *United States v. Curtis*, 568 F.2d 643, 646-47 (9th Cir. 1978) (*Miranda* warnings not

confession admissible.⁶¹⁰ The judge must determine whether the confession was given voluntarily by considering the totality of the circumstances present at the time of questioning.⁶¹¹ The compulsion invalidating the confession can arise from the threat of either penal sanctions or certain noncriminal sanctions.⁶¹²

C. Waiver

After a suspect has been given *Miranda* warnings, he may waive his right to remain silent or his right to counsel, or both.⁶¹³ The waiver must be made knowingly, intelligently and voluntarily.⁶¹⁴ Whether

required as questioning was not custodial) ("[T]he issues of voluntariness and compliance with *Miranda* are separate constitutional defenses.").

610. See, e.g., *Davis v. North Carolina*, 384 U.S. 737, 740-42 (1966) (confession obtained during sixteen-day incommunicado questioning held involuntary; *Miranda* warnings are a significant factor in determining the voluntariness of a statement); *United States v. Schmidt*, 573 F.2d 1057, 1062 (9th Cir.), cert. denied, 439 U.S. 881 (1978) (confession to DEA agents which followed involuntary confession given to Peruvian agents, held voluntary) (the determination of voluntariness of a statement is done on a case-by-case basis; the test is "whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or deny a suspected participation in a crime.") (quoting *Lynons v. Oklahoma*, 322 U.S. 596, 602 (1944)). Cf. *United States v. Duncan*, 570 F.2d 292, 293 (9th Cir. 1978) (per curiam) (statement made by defendant properly admitted against him, when he had been subpoenaed to appear before grand jury, had been given full *Miranda* warnings, and had executed a written waiver); *United States v. Oaxaca*, 569 F.2d 518, 522-23 (9th Cir.), cert. denied, 439 U.S. 926 (1978) (confession of defendant in bank robbery case who "seemed alert," gave "fairly specific answers" to officers' questions, was in good condition and not suffering adverse symptoms from medical problems was voluntary); *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1277 (9th Cir. 1979) (because deportation proceedings are civil and not criminal in nature, the analysis of voluntariness is markedly different from that used in a criminal situation).

611. *Sims v. Georgia*, 385 U.S. 538, 544 (1967) (trial judge must make preliminary finding of voluntariness of confession and this finding must clearly appear from the record); *United States v. Johnson*, No. 77-3808, slip op. at 4121 (9th Cir. Dec. 19, 1978) (the "voluntariness test" is whether the confession was 'extracted by any sort of threats or violence, . . . [or] by the exertion of any improper influence'.") (quoting *Hutto v. Ross*, 429 U.S. 28, 30 (1976)); *United States v. Brown*, 575 F.2d 746, 748 (9th Cir. 1978) (per curiam) (record must show trial court's consideration of the voluntariness issue with unmistakable clarity). See also *United States v. Curtis*, 568 F.2d 643, 647 (9th Cir. 1978) (voluntariness will not be considered on appeal if not contested in the trial court) ("[I]t is particularly essential that this issue be raised before or during trial.")

612. *Ryan v. Montana*, 580 F.2d 988, 990 (9th Cir. 1978) (compulsion not found in refusing to grant defendant immunity in probation revocation hearing). See *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-06, 808-09 (1977) (choice of waiving immunity or losing job held compulsion within terms of fifth amendment).

613. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). The decision to speak must be an "unfettered exercise of [the defendant's] own will." *Id.* at 460. Cf. *United States v. Botero*, 589 F.2d 430, 433 (9th Cir. 1978), cert. denied, 99 S. Ct. 2162 (1979) (statement admissible when defendant, after waiving *Miranda* rights, was denied the right to make a phone call, when the understood purpose of the call was *not* to obtain an attorney).

614. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

there is a valid waiver is a factual inquiry, decided on a case-by-case basis.⁶¹⁵ Although the suspect may revoke his waiver, and thereby preclude further questioning,⁶¹⁶ pauses between answers given after a waiver will not necessarily serve as a revocation,⁶¹⁷ nor will the suspect's choice to answer some questions and not others.⁶¹⁸

Once a defendant has claimed his right to remain silent, he may later change his mind and answer police questions. In *Michigan v. Mosley*,⁶¹⁹ the Supreme Court ruled that a defendant had withdrawn his prior assertion of the fifth amendment right against self-incrimination. The Court, however, has not decided whether a defendant who has invoked his fifth or sixth amendment right to counsel may waive that right prior to consulting with counsel or outside the presence of counsel.⁶²⁰ The Ninth Circuit, however, in *United States v. Rodriguez-Gastelum*⁶²¹ held that a defendant's statement obtained after an assertion of his fifth amendment right to counsel is not per se inadmissible if made prior to his consulting with counsel. Other circuits are divided on this issue,⁶²² and prior to *Rodriguez-Gastelum* the Ninth Circuit's

615. See *United States v. Schmidt*, 573 F.2d 1057, 1062 (9th Cir.), cert. denied, 439 U.S. 881 (1978) (determination of admissibility of confession is on a case-by-case basis). See, e.g., *United States v. Martinez*, 588 F.2d 1227, 1234-35 (9th Cir. 1978) (defendant who testified to understanding *Miranda* warnings on a printed waiver card, which he had signed, held to have waived his *Miranda* rights knowingly and intelligently, although the oral warnings were given in Spanish spoken with Mexican accent, while defendant spoke Spanish with a Cuban accent); *United States v. Basile*, 569 F.2d 1053, 1056-57 (9th Cir.), cert. denied, 436 U.S. 920 (1978) (defendant was given *Miranda* warnings twice within forty-five minutes, freely talked with officers after these warnings and testified in his own defense as an intelligent and articulate witness; held to have impliedly waived *Miranda* rights).

616. *United States v. Lorenzo*, 570 F.2d 294, 298 (9th Cir. 1978) (failure to respond to one question out of several held not a revocation of defendant's waiver of *Miranda* rights).

617. See *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966); *United States v. Lorenzo*, 570 F.2d 294, 297 (9th Cir. 1978).

618. See *United States v. Ford*, 563 F.2d 1366, 1367 (9th Cir.), cert. denied, 434 U.S. 1021 (1977) (intermittent silences in response to questions did not revoke prior *Miranda* waivers).

619. 423 U.S. 96 (1975). The defendant in *Mosley* was arrested for robbery, and before interrogation on that crime, was given his *Miranda* warnings. Defendant invoked the *Miranda* rights and questioning ceased. More than two hours later, another interrogator returned, gave the defendant new *Miranda* warnings, and began questioning concerning an unrelated murder. The Supreme Court held a statement, given during the second interrogation, to be admissible against the defendant in a murder prosecution. The *Mosley* Court found that per se application of the language in *Miranda* would be too restrictive on police and in effect would imprison the defendant in his rights. *Id.* at 102.

620. *Id.* at 101 n.7. ("The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since *Mosley* made no such request at any time.")

621. 569 F.2d 482 (9th Cir.) (en banc), cert. denied, 436 U.S. 919 (1978).

622. The Fifth Circuit currently is split. Compare *United States v. Massey*, 550 F.2d 300, 307 (5th Cir. 1977) with *United States v. Hodge*, 487 F.2d 945, 946 (5th Cir. 1973) (per

position had been unclear. In *United States v. Flores-Calvillo*,⁶²³ for example, one Ninth Circuit panel had held that, once a request for counsel was made, no questioning could take place until after the defendant had consulted with counsel, and any statement obtained in the meantime would be excluded. In *United States v. Pheaster*,⁶²⁴ another panel held that such a request for counsel could be waived prior to defendant's consulting with counsel, and thereby make a statement given during this period admissible. The *Rodriguez-Gastelum* court faced a choice between the spirit or letter of *Miranda*. Seven members of the panel chose the former,⁶²⁵ allowing the defendant to waive his sixth amendment right to counsel after having asserted that right, provided the waiver is proper.⁶²⁶

Rodriguez-Gastelum allows a police officer to inform a suspect of the evidence against him after the suspect has requested counsel. If the suspect is not badgered, pressured or coerced, he may then waive his previously invoked right to counsel.⁶²⁷

The standard of waiver adopted by the *Rodriguez-Gastelum* court caused three members of the panel to dissent in part. The dissent proposed a stricter standard of waiver, observing that "[t]he waiver . . . [should] be explicit, initiated by the suspect, and not in any way induced by the interrogators."⁶²⁸ The majority rejected this standard, as

curiam). The Eighth and Tenth Circuits appear consistent with the new Ninth Circuit position. See *United States v. Scogin*, 459 F.2d 182, 184 (8th Cir. 1972); *Halloway v. United States*, 495 F.2d 835, 839 (10th Cir. 1974). The Seventh Circuit recently reserved this question. *White v. Finkbeiner*, 570 F.2d 194, 200-01 n.3 (7th Cir. 1978) (question whether right can ever be waived by defendant before it is honored is left "for another day").

623. No. 75-3785 (9th Cir. July 14, 1976), *opinion vacated and remanded in light of* *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir. 1978) (en banc), 571 F.2d 512 (9th Cir. 1978).

624. 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977).

625. "[A] majority of the court is now satisfied that the *per se* rule . . . is neither required by the Sixth Amendment nor consistent with good law enforcement . . . *Miranda* must be applied with . . . 'flexibility and realism' . . ." *United States v. Rodriguez-Gastelum*, 569 F.2d 482, 486 (9th Cir.) (en banc), *cert. denied*, 436 U.S. 919 (1978).

626. *Id.* at 487-88 (quoting *United States v. Flores-Calvillo*, No. 75-3785, slip op. at 4-5 (9th Cir. July 14, 1976), *opinion vacated and remanded in light of* *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir. 1978) (en banc), 571 F.2d 512 (9th Cir. 1978)).

627. 569 F.2d at 485 n.6, 487-88. See *Pierce v. Cardwell*, 572 F.2d 1339, 1341 (9th Cir. 1978) (police cannot question defendant after he has requested counsel, but may present the evidence they have against him and resume questioning should the defendant, after seeing this evidence, waive his request); *United States v. Wilson*, 571 F.2d 455, 457 (9th Cir. 1978) (statement made by defendant who had requested counsel but later waived his request after being informed of additional charge against him, was properly admitted against him at trial).

628. *United States v. Rodriguez-Gastelum*, 569 F.2d 482, 489 (9th Cir.) (en banc), *cert. denied*, 436 U.S. 919 (1978) (Anderson, Browning & Goodwin, Circuit JJ., dissenting).

it would have the same effect as a per se exclusion and would be, therefore, too restrictive.⁶²⁹

V. TRIALS

A. *Elements of Crimes*

1. Intent

To sustain a conviction for a federal crime the prosecution is required to allege in the indictment,⁶³⁰ as well as to prove at trial, every element of the offense. This includes the element of criminal intent.⁶³¹ Although the defendant is responsible for proving his appropriate defenses, the prosecution may not shift this essential element of the offense to the defendant.⁶³² There are, however, exceptions to the

629. *Id.* at 488.

630. *United States v. King*, 587 F.2d 956, 963 (9th Cir. 1978) (failure of an indictment to detail each element of the charged offense generally constitutes a fatal defect).

631. *United States v. Erksine*, 588 F.2d 721, 722 (9th Cir. 1978) ("The rule that a defendant may rebut or seek to disprove the Government's case by showing that one or more elements of a criminal offense did not occur extends to any of the mental components necessary to establish guilt of the crime in question."); *United States v. Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978) (per curiam) (tolling of statute of limitations pursuant to 18 U.S.C. § 3290 (1976) requires prosecution to prove concealment with intent to avoid arrest or prosecution); *United States v. Edler Indus., Inc.*, 579 F.2d 516, 522 (9th Cir. 1978) (evidence of non-military uses of information is relevant to the issue of scienter; whether the defendant knew or should have known he was violating the law); *United States v. Brown*, 578 F.2d 1280, 1284 (9th Cir. 1978) (government required to prove intent relating to fraudulent act, but not as to knowledge that the instrument used is a security under the Security Act); *United States v. McDonald*, 576 F.2d 1350, 1359 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978) (no specific intent proven "because the logical relationship between what he *could* have known and a specific intent has no rational basis"); *United States v. Burnim*, 576 F.2d 236, 237 (9th Cir. 1978) (unarmed bank robbery, as defined in 18 U.S.C. § 2113(a) (1976) is a general, rather than a specific intent crime); *United States v. Pallan*, 571 F.2d 497, 501 (9th Cir.), *cert. denied*, 436 U.S. 911 (1978) (in prosecution for tax evasion, the term "willfully" requires proof of specific intent); *United States v. Lorenzo*, 570 F.2d 294, 299 (9th Cir. 1978) (passing of counterfeit bill is not criminal offense in violation of 18 U.S.C. § 471 (1976) unless government proves knowledge of counterfeit nature and intent to pass "bad money"); *United States v. Jones*, 569 F.2d 499, 501-02 (9th Cir.), *cert. denied*, 436 U.S. 908 (1978) (refusal by trial court to instruct that "intent to avoid confinement was an element" of proof required for conviction for escape not reversible error); *United States v. Jenkins*, 567 F.2d 896, 897 (9th Cir. 1978) (government has the burden of proving the specific intent charged).

632. *Tucker v. Wolff*, 581 F.2d 235 (9th Cir. 1978). In *Tucker* the trial court instructed the jury that NEV. REV. STAT. § 205.065 (1973) created a presumption that "anyone who unlawfully enters one of the structures does so 'with intent to commit grand or petit larceny or a felony therein, unless such unlawful breaking and entering or unlawful entry shall be explained by testimony satisfactory to the jury to have been made without criminal intent'." *Id.* at 238. Tucker's defense was that he was too intoxicated to form the intent required to commit the crime of burglary. The Ninth Circuit concluded that such a statutory presump-

general requirement of intent in some federal statutes.⁶³³

In *United States v. Erne*,⁶³⁴ the court stated the factors that must be considered in evaluating the propriety of a criminal statute which does not require proof of a mental state, but rather imposes strict liability for a defendant's actions: (1) behaviors that are not positive aggressions, but rather neglect of a public welfare duty;⁶³⁵ (2) the nature of assumed responsibilities places the accused in a position to prevent the violation;⁶³⁶ (3) penalties for the violation are usually small and do no grave damage "to the accused's reputation;"⁶³⁷ (4) the "probability of regulation is so great that one who does the act is presumed to be aware of the regulation;"⁶³⁸ and (5) a legislative history that reveals an intention not to require proof of intent.⁶³⁹

When the criminal statute is unclear as to the requisite level of intent, an analysis of the legislative history is required.⁶⁴⁰ In order to prove the requisite intent, the prosecution is entitled to present circumstantial evidence from which the trier of fact may draw reasonable inferences.⁶⁴¹

tion did not constitute harmless error, and remanded to the district court for examination of the "unconstitutionality" issue that the presumption presented. *Id.* at 239.

633. See *United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978). In *Mowat*, the defendant was convicted of violating 18 U.S.C. § 1382 (1976), which provides: "Whoever, within the jurisdiction of the United States, goes upon any military, naval or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . [s]hall be fined not more than \$500 or imprisoned not more than six months, or both." The court, noting that the statute did not require intent on its face and the common law term of "trespass" was not used concluded, that, "Congress clearly did not make motive or intent a factor in determining guilt and on these facts the absence of *mens rea* does not invalidate the statute." *Id.* at 1204.

634. 576 F.2d 212 (9th Cir. 1978). The defendant in *Erne* was convicted under 26 U.S.C. § 7215 (1976) for failure to deposit withholding and FICA taxes into a bank trust account. The defendant asserted that such a crime required proof of intent to violate tax law. The Ninth Circuit, after an analysis of the factors, concluded that the statute, enacted in order to avoid "the difficulty of proving willfulness," was justified. *Id.* at 215. See [1958] U.S. CODE CONG. & AD. NEWS 2187, 2191.

635. 576 F.2d at 214.

636. *Id.*

637. *Id.*

638. *Id.* at 214-15. See *Lambert v. California*, 355 U.S. 225 (1957) (registration provision violates due process where no "willfulness" need be shown for conviction and applied to person who has no knowledge of duty to register).

639. 576 F.2d at 215.

640. *United States v. Mowat*, 582 F.2d 1194, 1203 (9th Cir. 1978) ("[T]he plain meaning of the statute . . . indicates that specific intent need not be proven."); *United States v. Graham*, 581 F.2d 789, 790 (9th Cir. 1978) (nothing in the legislative purpose or history suggests that Congress intended the corrupt purpose to be the only purpose).

641. *United States v. Brown*, 578 F.2d 1280, 1286 (9th Cir. 1978) (trier of fact can view evidence as a whole and consider relevant circumstances in determining specific intent);

The courts often must interpret statutory language that was intended to convey the level of intent required for conviction. Whereas the requirements of the phrase "knowing" have been addressed and settled by the Ninth Circuit,⁶⁴² the meaning of the term "willful" has been interpreted in many ways depending on the specific statute.⁶⁴³ Generally, "an act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with a purpose either to disobey or disregard the law."⁶⁴⁴ The term "willful," however, is to be distinguished from "knowing" in that one can "willfully" break the law without knowing of its existence.⁶⁴⁵

2. Conspiracy

The crime of conspiracy is a separate and distinct offense.⁶⁴⁶ In or-

United States v. Winn, 577 F.2d 86, 91 (9th Cir. 1978) (circumstantial evidence can be used to prove any fact); United States v. McDonald, 576 F.2d 1350, 1360 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978) (circumstantial evidence is sufficient to find intent to defraud); United States v. Young, 573 F.2d 1137, 1139 (9th Cir. 1978) ("conspiracy may be proved by evidence entirely circumstantial and viewed collectively").

642. United States v. Jewel, 532 F.2d 697, 700 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976) ("knowingly" requirement may be satisfied upon showing that the defendant acted with "deliberate ignorance . . . [or] an awareness of the high probability of the existence of the fact in question"). See United States v. Valle-Valdez, 554 F.2d 911, 913-14 (9th Cir. 1977) ("knowing" requires subjective awareness of a high probability of the existence of the fact in question and a conscious or deliberate disregard of that probability by the defendant in order to remain ignorant of the fact).

643. United States v. McIntyre, 582 F.2d 1221, 1225 (9th Cir. 1978) ("The meaning of 'willful' has not been uniformly applied in federal criminal statutes.").

644. United States v. Winn, 577 F.2d 86, 91 (9th Cir. 1978). See United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978). The defendants in *McIntyre* were convicted of the willful interception of oral communications by wire in violation of 18 U.S.C. § 2511(1)(a)-(b) (1976). The Ninth Circuit concluded that a willful state of mind to do the illegal act, rather than a willful desire to break the law, was the pivotal issue. 582 F.2d at 1225. Similarly, in United States v. Dreitzler, 577 F.2d 539 (9th Cir. 1978), when the language requiring "bad purpose" was omitted from the jury instruction, the court found there to be no error when the instruction as a whole conveyed the need for the necessary specific intent. *Id.* at 549. See also United States v. Jones, 569 F.2d 499, 501-02 (9th Cir.), *cert. denied*, 436 U.S. 908 (1978) (willful failure to remain or return does not require an intent to avoid confinement).

645. United States v. Brown, 578 F.2d 1280 (9th Cir. 1978). The defendant in *Brown* was convicted in violation of 15 U.S.C. § 77(a) (1976). The Ninth Circuit concluded that knowledge that the items involved in the fraud were securities as defined by the statute was unimportant as long as specific intent regarding the fraudulent, misleading or deceitful conduct was demonstrated. 578 F.2d at 1284.

646. United States v. Carman, 577 F.2d 556 (9th Cir. 1978). In *Carman*, the defendant was acquitted of one of the substantive offenses that gave rise to the conspiracy. As a result, the Ninth Circuit reversed the conspiracy count because of the following combination of factors in the case: the conspiracy count was of the "composite" type; the jury received a "one-is-enough" charge, making it impossible to know upon which crime the conspiracy verdict was based; and one of the substantive counts was reversed for failure to state a crime.

der to sustain a conspiracy conviction, the prosecution must establish an agreement to engage in criminal activity⁶⁴⁷ accompanied by an overt act committed in furtherance of the agreement.⁶⁴⁸ Whereas the defendant must be more than a mere spectator,⁶⁴⁹ only "slight evidence" is needed to link the defendant to the established conspiracy.⁶⁵⁰ The Ninth Circuit in 1978 emphasized that the prosecution must establish beyond a reasonable doubt the defendant's connection with the conspiracy, however slight it may be.⁶⁵¹

Id. at 566. The court emphasized that such a result is limited to the situation in which all three factors exist and, therefore, in other situations a conspiracy conviction may prevail even if all of the substantive counts are reversed. *Id.* at 567-68. See *United States v. Talington*, 588 F.2d 415, 417 (9th Cir. 1978) ("one-is-enough" charge makes it impossible to affirm conviction when three of five false statements were not found to be material). Cf. *United States v. Miller*, 546 F.2d 320, 325 (9th Cir. 1976) (completion of objective is not element of conspiracy and, therefore, acquittal on substantive count does not preclude conviction on conspiracy count with substantive offense as its object).

647. *United States v. Carman*, 577 F.2d 566, 567 n.12 (9th Cir. 1978). This act need not be unlawful. *Id.* See *United States v. Adams*, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978), where the court reasoned that the initial agreement need not contemplate "the entire series of assaults. . . . The ongoing relationship and the similarity of the crimes over a short period of time convince us that there was an implicit continuing agreement to commit the crimes." *Id.* at 197 n.10. See also *United States v. Espinoza*, 578 F.2d 224, 228 (9th Cir.), *cert. denied*, 439 U.S. 849 (1978) (prior similar act may be used to prove existence of unlawful agreement); *United States v. Uriarte*, 575 F.2d 215, 218 (9th Cir.), *cert. denied*, 439 U.S. 936 (1978) (evidence of other criminal activity relevant to existence and aims of conspiracy admissible).

648. 577 F.2d at 567 n.12. In addition, there is no need for the object of the agreement to be completed in order for a conspiracy count to be sustained. *United States v. King*, 587 F.2d 956, 962 (9th Cir. 1978) (fact that drug deal never materialized irrelevant to conspiracy charge); *United States v. Espinoza*, 578 F.2d 224, 228 (9th Cir.), *cert. denied*, 439 U.S. 849 (1978) ("Espinoza with knowledge of the existence of the unlawful enterprise acted to further it.").

649. *United States v. Rosales*, 584 F.2d 870, 874 (9th Cir. 1978) (in view of evidence suggesting that defendant was actual supplier of cocaine, court distinguished cases in which defendant was "merely a spectator—knowing or unknowing—and not a participant in the criminal activity"). See *United States v. Radlick*, 581 F.2d 225, 228 (9th Cir. 1978) (contention of unknowing participation justifies admission of evidence to prove intent under FED. R. CRIM. P. 404(b)).

650. *United States v. Thomas*, 586 F.2d 123, 127 (9th Cir. 1978) ("the only issue is whether the evidence was sufficient to establish beyond a reasonable doubt that Thomas had a slight connection to the Avery conspiracy proved"). See *United States v. Fried*, 576 F.2d 787, 793 n.7 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978), where the court distinguished between the quantum of evidence needed to support a conviction (each element must be proven beyond a reasonable doubt) and the lesser amount needed to allow the introduction of co-conspirator's statements pursuant to FED. R. EVID. 801(d)(2)(E) (judicial policy of placing probative and reasonably credible evidence before the trier of fact). See also *United States v. Dunn*, 564 F.2d 348, 356-57 (9th Cir. 1977) (discussion of the slight evidence rule in the context of sufficiency of evidence).

651. In *United States v. Thomas*, 586 F.2d 123 (9th Cir. 1978), the Ninth Circuit reasoned:

A frequent contention on appeal is that in the indictment the prosecution alleged a single conspiracy yet proved more than one at trial, with the appellant common to both.⁶⁵² Such variance in proof, it is often alleged, is prejudicial.⁶⁵³ Refuting this challenge, the court in *United States v. Thomas*⁶⁵⁴ emphasized that *Kotteakos v. United States*⁶⁵⁵ involved uniquely erroneous jury instructions⁶⁵⁶ and stressed that whether a scheme is one or several conspiracies becomes a question of fact once a prima facie case of a single conspiracy is presented.⁶⁵⁷ In *Thomas*, the court enunciated the standard of proof by which a charge of conspiracy would be judged. The government must show that (1) the defendant knew of and agreed to the purpose of the conspiracy; (2) he had reason to know others were involved; and (3) his benefits were dependent on the success of the entire venture.⁶⁵⁸

The Ninth Circuit in 1978 reaffirmed that while 42 U.S.C. section 1985 reaches private conduct, it is limited to conspiracies motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."⁶⁵⁹

Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the *connection is slight*, is sufficient to convict him with knowing participation in the conspiracy. Thus, the word "slight" properly modifies "connection" and not "evidence." It is tied to that which is proved, not to the type of evidence or the burden of proof.

Id. at 127 (quoting *United States v. Dunn*, 564 F.2d 348, 357 (9th Cir. 1977)). See *United States v. Weiner*, 578 F.2d 757, 769 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) ("Once the existence of a conspiracy has been established, independent evidence is necessary to show prima facie the defendant's connection with the conspiracy, even if the connection is slight.").

652. *United States v. Brown*, 578 F.2d 1280 (9th Cir.), *cert. denied*, 439 U.S. 928 (1978). The defendant in *Brown* alleged that the evidence showed two conspiracies, with the defendant a common factor in each. The Ninth Circuit sustained a finding that the second transaction was merely "a new source of revenue . . . utilized in the consummation of the on-going conspiracy." *Id.* at 1286.

653. *Id.* at 1286.

654. 586 F.2d 123, 131-32 (9th Cir. 1978).

655. 328 U.S. 750 (1946).

656. 586 F.2d 123 at 131-32.

657. *Id.* at 132. See *Kotteakos v. United States*, 328 U.S. 750 (1946). In *Kotteakos*, thirty-two defendants were charged with one conspiracy. The jury was instructed that, "It is one conspiracy, and the question is . . . which of the defendants . . . are members." *Id.* at 767. The evidence showed that although there was one central figure, there were at least eight independent groups, none of which had any connection with any other. The court of appeals held the instruction to be plainly wrong, since the jury could not possibly have found . . . that there was only one conspiracy. *Id.* at 768.

658. 586 F.2d at 132.

659. *Blevins v. Ford*, 572 F.2d 1336 (9th Cir. 1978). Convicted of defrauding investors, Blevins brought a civil action against the government witness, his own attorney, and the prosecuting attorney for conspiring to conceal the witnesses' perjury at the first trial. The dismissal of Blevin's 42 U.S.C. § 1985 claim was sustained. The court noted: "While 42

3. Lesser included offenses

In order for a crime to be a lesser included offense of another crime "the two offenses 'must relate to protection of the same interests, and must be so related that in the general nature of these crimes . . . proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense'."⁶⁶⁰ This formulation provides the necessary guidance for determining whether a crime is a lesser included offense pursuant to the Federal Rules of Criminal Procedure.⁶⁶¹

The Ninth Circuit recently reaffirmed the "inherent relationship" test in *United States v. Raborn*.⁶⁶² Convicted of bribery,⁶⁶³ the defendant in *Raborn* claimed on appeal that the trial court erroneously refused to give an instruction on an alternative lesser included offense.⁶⁶⁴ The court reasoned that, whereas "both sections seek to prevent the divided loyalty of public employees,"⁶⁶⁵ the element in the lesser offense, that salary be compensation to an employee of the United States, required more than the greater offense in which compensation was required only "in return for influence or the commission of a wrongful act."⁶⁶⁶ The

U.S.C. § 1985 reaches private conduct, it does not extend to 'all tortious, conspiratorial interferences with the rights of others,' . . . but is rather limited in its coverage to conspiracies motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus.'" *Id.* at 1338 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971)). In response to Blevin's statement that he had "suffered discrimination at the hands of a group of attorneys," the court stated: "[T]he complaint does not charge a conspiracy directed at non-lawyers as a class, but only the specific conduct of three people who are also lawyers, directed at one person who is not a lawyer, but not because he is not a lawyer." *Id.* at 1338.

660. *United States v. Stolarz*, 550 F.2d 488, 491 (9th Cir. 1977) (quoting *United States v. Whitaker*, 447 F.2d 314, 318 (D.C. Cir. 1971)). This test is often referred to as the "inherent relationship" test. *Id.*

661. FED. R. CRIM. P. 31(c). Upon a proper showing that the lesser crime is indeed a "lesser included offense," the defendant is entitled to an instruction on the lesser crime. Such a showing, in addition, permits a jury to find guilt on the lesser charged offense, even if not alleged in the indictment. See 8A MOORE'S FEDERAL PRACTICE ¶ 31.03 [1]-[5] (2d ed. 1977).

662. 575 F.2d 688 (9th Cir. 1978).

663. The defendant was indicted under 18 U.S.C. § 201(c) (1976), which "requires proof that: (1) a public official (2) corruptly (3) asked, demanded, received, or agreed to receive an item of value (4) in return for being influenced in the performance of any official act or being influenced to commit or aid in committing a fraud on the United States, or being induced to act in violation of an official duty." 575 F.2d at 692.

664. Defendant claimed that a violation of 18 U.S.C. § 209 was a lesser offense included within 18 U.S.C. § 201(c). "Section 209 prohibits (1) an officer or employee of the executive branch or an independent agency of the United States government from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States. 575 F.2d at 691-92.

665. *Id.* at 692.

666. *Id.*

lesser offense, therefore, would have required proof of an additional element not needed to constitute the greater offense.⁶⁶⁷

4. Crimes involving regulation of firearms

The Gun Control Act of 1968,⁶⁶⁸ has been construed quite liberally by the courts.⁶⁶⁹ Sections of the Act proscribing a felon's mere possession of a firearm have been the subject of an array of challenges.⁶⁷⁰ Recently, in *United States v. Robbins*,⁶⁷¹ the Ninth Circuit applied the rule of *Barrett v. United States*,⁶⁷² in which the Supreme Court held that, for a conviction to be sustained, it does not matter that the transportation in interstate commerce occurred long before the defendant received the firearm.⁶⁷³

In *Robbins* the defendant was convicted of receipt of firearms through interstate commerce in violation of both 18 U.S.C. sections 1202(a) and 922(h).⁶⁷⁴ The court concluded that a sufficient "nexus" is established by the fact that the firearm "previously traveled in interstate commerce."⁶⁷⁵ A temporary confiscation of the firearm by law enforcement agents and subsequent return to the defendant will not "insulate" the "receipt" element of a section 922(h) violation.⁶⁷⁶

The Ninth Circuit also considered under what circumstances a previ-

667. *Id.* See also *Olais-Castro v. United States*, 416 F.2d 1155 (9th Cir. 1969).

668. 18 U.S.C. §§ 921-928 (1976).

669. See *Scarborough v. United States*, 431 U.S. 563, 564 (1977) (previous travel in interstate commerce satisfies nexus between possession of firearm by felon and commerce); *Barrett v. United States*, 423 U.S. 212, 216 (1976) (no limit on length of time firearm traveled in interstate commerce before receipt by felon). See also *United States v. Moore*, 580 F.2d 360, 362 (9th Cir. 1978) (defendant indicted for violation of 18 U.S.C. § 924(c)(1) (1976) need not actually brandish or discharge firearm).

670. See 18 U.S.C. § 922(h) (1976) which provides: "It shall be unlawful for any person (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." See also 18 U.S.C. Appendix 1202(a) (1976) (prohibits possession, receipt or transport by a felon of a firearm that has traveled in interstate commerce); *United States v. Herrell*, 588 F.2d 711 (9th Cir. 1978) *United States v. Robbins*, 579 F.2d 1151, 1153 (9th Cir. 1978).

671. 579 F.2d 1151 (9th Cir. 1978).

672. 423 U.S. 216 (1976).

673. *Id.* at 216; *United States v. Robbins*, 579 F.2d at 1153.

674. The defendant in *Robbins* consented to the search of his vehicle, which led to the discovery of a pistol manufactured in Connecticut. After paying a \$100 fine for carrying a pistol without a permit, he sought return of the pistol. Upon signing the receipt for the pistol and taking possession of it, the prosecution alleged that he violated § 922(h), prohibiting receipt of a firearm by a felon. 579 F.2d at 1154.

675. *Id.* at 1153 (citing *Scarborough v. United States*, 431 U.S. 563, 564 (1977)).

676. *Id.* at 1154. See *United States v. Haddad*, 558 F.2d 968, 974 (9th Cir. 1977) ("receipt" is sufficient for a violation of § 922(h)).

ously convicted felon's status may change, rendering the application of firearm regulation statutes inappropriate.⁶⁷⁷ The court concluded that "convicted felon as used in the statute does not include one whose prior conviction is later reversed because of certain constitutional defects."⁶⁷⁸ On the other hand, the violation of statutes providing for procedural safeguards⁶⁷⁹ or ones which expunge a defendant's record upon fulfillment of parole or sentence conditions⁶⁸⁰ do not result in a changed status.⁶⁸¹

5. Crimes involving aliens

The deportation of aliens is governed by the Immigration and Nationality Act.⁶⁸² The proceedings are civil in nature⁶⁸³ and "must conform to traditional standards of fairness encompassed in due process."⁶⁸⁴ In the proceedings, the defendant alien must initially establish that he entered the United States lawfully.⁶⁸⁵ If this burden is sustained, the Immigration and Naturalization Service must present

677. *United States v. Herrell*, 588 F.2d 711 (9th Cir. 1978). The defendant in *Herrell* alleged that his prior guilty plea to a grand theft charge was void because the value of the goods admittedly stolen had not been factually established. This was said to be in violation of ARIZ. R. CRIM. P. 17-3, which provides:

Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court and determine that he wishes to forego the constitutional rights of which he has been advised, that his plea is voluntary and not the result of force, threats or promises (other than a plea agreement) and that there is a factual basis for the plea.

Herrell claimed additionally that since his grand theft charge had been dismissed and his civil rights restored pursuant to Arizona's expungement statute, his status as a convicted felon had changed, rendering § 922(h) inapplicable to him. *Id.* at 713.

678. 588 F.2d at 713 (citing *United States v. Pricepaul*, 540 F.2d 417, 424 (9th Cir. 1976)).

679. In *Herrell*, the court concluded that the federal rules were not constitutionally mandated by *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). 588 F.2d at 713 n.4. *Boykin* provides the only constitutional requirements for a guilty plea: the defendant must be informed of waiver of right against compulsory self incrimination, jury trial, and confrontation of accusers. 395 U.S. at 243. The court further stated in *Herrell* that the federal rules are based on the "housekeeping power of the Supreme Court" in order to assure voluntariness. 588 F.2d at 713 n.4.

680. ARIZ. REV. STAT. § 13-1744 (1957-77 Supp.), amended and renumbered as ARIZ. REV. STAT. § 13-807 (1978), contains the proviso: "except that the conviction may be pleaded and proved in any subsequent prosecution of such person for any offense as if the judgment of guilt has not been set aside." 588 F.2d at 712.

681. 588 F.2d at 713.

682. 8 U.S.C. §§ 1101-1503 (1976).

683. *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1978). See *Murgia-Meledrez v. INS*, 407 F.2d 207, 208-09 (9th Cir. 1969).

684. *Cuevas-Ortega v. INS*, 588 F.2d at 1277.

685. 8 U.S.C. § 1361 (1976); *Hoonsilapa v. INS*, 575 F.2d 735 (9th Cir.), modified, 586 F.2d 755 (1978) (burden of showing lawful entry is on the subject of the proceeding).

"clear, unequivocal, and convincing" evidence of alienage and deportability.⁶⁸⁶ If it does so, a rebuttable presumption of deportability is created.⁶⁸⁷ Although the defendant may elect to remain silent,⁶⁸⁸ such silence could lessen the government's burden of proof.⁶⁸⁹

Whether or not an alien will be deported depends upon whether the government can establish that the alien has exceeded the terms of his admission or has violated one of the regulations that governs his stay. Certain criminal conduct is proscribed by such regulations. Consequently, an alien involved in a state or federal criminal action may find himself subject to deportation proceedings.⁶⁹⁰ For example, in *McJunkins v. INS*⁶⁹¹ the Ninth Circuit concluded that the government might establish a prima facie case for deportation by showing that the defendant alien was found to be an addict in a proceeding under the Narcotic Addict Rehabilitation Act.⁶⁹² Recently, the Ninth Circuit concluded that information that is initially the product of an illegal search, but is subsequently obtained from an independent source, may be used by the government at a deportation proceeding.⁶⁹³

6. Securities

The purpose of the Securities Act of 1933⁶⁹⁴ is to "compel full and fair disclosure in the issuance of securities so that investors will be ade-

686. *Hoonsilapa v. INS*, 575 F.2d 735 (9th Cir.), *modified*, 586 F.2d 755 (1978).

687. 575 F.2d at 737.

688. *Cuevas-Ortega v. INS*, 588 F.2d at 1277-78.

689. *Hoonsilapa v. INS*, 575 F.2d at 737.

690. *See Winestock v. INS*, 576 F.2d 234 (9th Cir. 1978). The defendant in *Winestock* was convicted of dealing in counterfeit obligations in violation of 18 U.S.C. § 473 (1976). As a result he was found to be deportable for conviction of a crime involving moral turpitude under 8 U.S.C. § 1251 (a)(4) (1976). 576 F.2d at 235. *See also Forstner v. INS*, 579 F.2d 506 (9th Cir. 1978) (per curiam). Forstner pleaded guilty to a state narcotics charge and subsequently was deported pursuant to § 1251(a)(11) (deportation required for any alien convicted of "illicit possession of narcotics or marijuana") 579 F.2d at 507.

691. 579 F.2d 533 (9th Cir. 1978).

692. Narcotic Addict Rehabilitation Act of 1966, §§ 2-316, 42 U.S.C. §§ 3401-3426 (1976); 579 F.2d at 536. The court reconciled its result with *Robinson v. California*, 370 U.S. 660 (1962) (imposition of criminal sanctions for acquiring status of addict constitutes cruel and unusual punishment) by emphasizing that Congress has power to "impose conditions upon the privilege of remaining in this country which could not be imposed upon citizens." 579 F.2d at 536.

693. *Hoonsilapa v. INS*, 575 F.2d at 738. As a result of an illegal search of the defendant's home the INS was alerted that the defendant was possibly subject to deportation. A search of the files subsequently unearthed enough information to sustain deportation. The court held "that there is no sanction to be applied when an illegal arrest only leads to the discovery of the man's identity and that merely leads to the official file." *Id.* at 738.

694. 15 U.S.C. §§ 77a-77aa (1976).

quately protected.”⁶⁹⁵ The Ninth Circuit in 1978 addressed several claims that convictions for securities laws violations were improper because the instruments used in the transactions were not securities as defined by the Act.

In *United States v. Dunlap*,⁶⁹⁶ the defendants were indicted under 18 U.S.C. section 2314⁶⁹⁷ for transportation of counterfeit securities in interstate commerce. The securities at issue were counterfeit department store scrip. The prosecution maintained that such instruments fell within the definition of securities as either an “evidence of indebtedness” or an instrument “commonly known as a security.”⁶⁹⁸ The Ninth Circuit concluded that “the statute disclose[d] no congressional intent to give a broad meaning to include” as securities “all obligations on the part of the maker of a paper to the holder.”⁶⁹⁹ In declining to make the two above-mentioned phrases a catchall rubric, the court cautioned that criminal statutes are to be strictly construed.⁷⁰⁰

In contrast, however, the Ninth Circuit in *United States v. Urciuoli*⁷⁰¹ affirmed a conviction for transporting stolen securities.⁷⁰² The defendant in *Urciuoli* asserted that canceled certificates ceased to be “securities” within the scope of the Securities Act.⁷⁰³ The court rejected this assertion, reasoning that the certificates retained their status as securities since there was nothing on their face to suggest their invalidity or nonredeemable status to an innocent purchaser who may have bought them for value.⁷⁰⁴

695. *United States v. Carman*, 577 F.2d 556, 564 (9th Cir. 1978).

696. 573 F.2d 1092 (9th Cir. 1978).

697. 18 U.S.C. § 2314 (1976).

698. 573 F.2d at 1093. 18 U.S.C. § 2311 (1976) provides in part: “‘Securities’ includes any note, stock certificate, bond, debenture, check, draft, . . . evidence of indebtedness, . . . or, in general, any instrument commonly known as a ‘security,’ . . . or any forged, counterfeited, or spurious representation of any of the foregoing”

699. 573 F.2d at 1094.

700. *Id.* See *Prussian v. United States*, 282 U.S. 675 (1931) (strictly construe criminal statutes).

701. 575 F.2d 768 (9th Cir. 1978) (per curiam).

702. 18 U.S.C. § 2314 (1976).

703. 575 F.2d at 769.

704. *Id.* But see *United States v. Simpson*, 577 F.2d 78 (9th Cir. 1978). Simpson was convicted in violation of 18 U.S.C. § 2314 (1976) (transportation of forged securities). Upon receiving canceled certificates, Simpson forged the names of the true owners and sold them to a stock brokerage firm. He claimed that since the securities were “valueless,” they fell outside the scope of § 2314. The court, while doubting the correctness of his premise, assumed its validity, but held the certificates to have value by reason of the fact that they were sold at their actual market value. *Id.* at 80. Simpson’s conviction, however, was reversed because he forged the endorsements on genuine certificates rather than forging the certificates themselves, as the court held the statute required. *Id.* at 81.

B. Severance

Rule 8(b) of the Federal Rules of Criminal Procedure permits joinder of two or more defendants if the charges against them arise out of "the same series of . . . transactions constituting an offense."⁷⁰⁵ While recognizing that the primary purpose of joinder is the promotion of efficiency in the administration of justice,⁷⁰⁶ the Ninth Circuit has been careful to guard against potential prejudice that may result from the joinder of multiple defendants. The Ninth Circuit therefore has interpreted rule 8(b) to require that "substantially the same facts . . . be adduced to prove each of the joined offenses."⁷⁰⁷

A defendant properly joined under rule 8(b), however, may move for severance pursuant to rule 14,⁷⁰⁸ when prejudicial joinder threatens to

705. FED. R. CRIM. P. 8(b) provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

706. The general rule is that a joint trial "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burdens upon citizens to sacrifice time and money to serve on juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once." *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978). See also *United States v. Adams*, 581 F.2d 193, 197 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) ("The purpose of Rule 8(b) is to balance the need to avoid the potential prejudice that may result from joining multiple defendants with the need to attain trial efficiency.").

707. *United States v. Satterfield*, 548 F.2d 1341, 1344 (9th Cir. 1977). Compare *id.* (when defendant was involved in only two of five charged bank robberies and most evidence related to other three, joinder improper because substantially same facts would not have been adduced at separate trials; allegation of charges similar in character insufficient to warrant joinder) with *United States v. Adams*, 581 F.2d 193, 197 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) (conviction for conspiracy, assault with intent to rob, robbery, and murder affirmed, rejecting contention that the five substantive charges did not constitute a "series of acts or transactions," so as to permit joinder under rule 8(b) rejected). The *Adams* court found the five incidents to constitute a series; the conspiracy count, charged in good faith, provided the necessary link. 581 F.2d at 197. See also *United States v. Olander*, 584 F.2d 876, 885 (9th Cir. 1978) (no error in conducting joint trial where co-defendants found fishing in violation of a court injunction protecting Indian fishing rights: "Rules 8(b) and 13 . . . fit these cases exactly. [The co-defendants] 'participated in the same act or transaction'—they were together, fishing on [co-defendant's] boat, when caught."); *United States v. Barney*, 568 F.2d 134, 135 (9th Cir. 1978), cert. denied, 435 U.S. 955 (1978) (per curiam) (no error in joining stolen vehicle charge against appellant and co-defendant with perjury charge against co-defendant when perjury count related to receipt appellant possessed when apprehended while driving stolen vehicle: "[A]lleged false testimony related directly to the illegal transaction with which appellant was charged Indeed, the facts underlying the joined offenses were so intertwined that most of the evidence admissible in proof of one was also admissible in proof of the other.") (citations omitted).

708. FED. R. CRIM. P. 14 provides:

deny him a fair trial.⁷⁰⁹ Unlike a rule 8(b) motion, which raises misjoinder as an issue of law,⁷¹⁰ the decision to grant or deny a motion for severance lies within the sound discretion of the trial court.⁷¹¹ The Ninth Circuit will not disturb a trial court's refusal to sever a joint trial unless the defendant can demonstrate that the prejudice to him from joinder so outweighed the consequent gain in judicial economy and efficiency that the refusal constituted an abuse of discretion.⁷¹² To meet this heavy burden the defendant must establish that a joint trial was so prejudicial as to have compelled the trial court to exercise its discretion to sever.⁷¹³

Although "[t]he burden of proving this prejudice is a difficult one and the ruling of the trial judge will rarely be disturbed,"⁷¹⁴ a successful challenge to a denial of severance has been made in at least three kinds of circumstances. Severance is improperly denied when (1) joinder effectively denies a defendant his sixth amendment right to con-

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements for confessions made by the defendants which the government intends to introduce in evidence at the trial.

709. See 8 MOORE'S FEDERAL PRACTICE ¶14.02[1], at 14-3 (2d rev. ed. 1978). See also *United States v. Roselli*, 432 F.2d 879, 901-02 (9th Cir. 1970) (although joinder is proper under rule 8(b), severance permitted when facts of a given case make it unlikely that jury will reach proper verdict; when few defendants are joined and few factual issues are involved, jurors competent to give impartial consideration).

710. See *United States v. Friedman*, 445 F.2d 1076, 1082 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971).

711. *United States v. Adams*, 581 F.2d 193, 197 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) ("Rule 14 motions for severance are committed to the sound discretion of the trial court."). See *United States v. Hernandez-Berceda*, 572 F.2d 680, 682 (9th Cir. 1978) ("Although the decision to grant . . . severance is a matter in which a trial judge has wide discretion . . . that discretion is not without limits.") (citations omitted).

712. See *United States v. Uriarte*, 575 F.2d 215, 217 (9th Cir.), *cert. denied*, 439 U.S. 963 (1978). The court noted that the "test for when severance should be granted is . . . 'whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever.'" *Id.* (citations omitted) (quoting *United States v. Brashier*, 548 F.2d 1315, 1323 (9th Cir. 1976)). See also *United States v. Adams*, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) (sufficient prejudice not shown merely because separate trial might offer better chance for acquittal).

713. *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978) ("[U]ltimate question is whether under all of the circumstances, it is within the capacity of the jurors to follow the court's admonitory instructions and, correspondingly whether they can collate and appraise the independent evidence against each defendant solely upon that defendant's own acts.").

714. *Id.* at 1127.

frontation,⁷¹⁵ (2) evidence, admissible only against a co-defendant, also incriminates the defendant, and despite admonitory instructions, cannot reasonably be expected to be ignored in the jury's determination of the defendant's guilt⁷¹⁶ or innocence,⁷¹⁷ and (3) it is clear that a co-

715. See *Bruton v. United States*, 391 U.S. 123, 125 (1968). *Bruton*, the leading case in this area, concerns the violation of a defendant's constitutional rights to confront and cross-examine the witnesses against him. In that case, defendants Evans and Bruton were jointly tried for armed postal robbery. Prior to trial, Evans had made a confession that inculpated Bruton. Although the confession was admitted into evidence, Evans did not testify. The court clearly instructed the jury that the confession was to be considered only in deciding the guilt or innocence of Evans. The Supreme Court reversed Bruton's conviction on the ground that his constitutional right to confront and cross-examine Evans, a witness against him, had been violated. The Court argued that it was unrealistic to assume that the jury could apply the confession against Evans and ignore its implication of Bruton. As such, the confession unduly prejudiced Bruton and subjected him to a conviction based upon incompetent evidence. The Court stressed that severance of trial could dispel such prejudice. *But see United States v. Basile*, 569 F.2d 1053, 1057-58 (9th Cir.), *cert. denied*, 436 U.S. 920 (1978). In *Basile*, the Ninth Circuit affirmed defendant Holden's conviction for possession of marijuana. In *Bruton*, the defendant was unable to cross-examine a co-defendant whose out-of-court statement, inculpatory as to the defendant, had been admitted into evidence. In *Basile*, the evidentiary constraints inherent in a joint trial had prevented Holden's introduction of the out-of-court statements of his co-defendant, Basile. The statements were exculpatory as to Holden. The Ninth Circuit, however, found no error in the trial court's refusal to sever. The court reasoned that because the evidence that Holden sought to introduce was eventually admitted, albeit not in the desired context, no undue prejudice had resulted from the joint trial.

Judge Hufstедler dissented, contending that Basile's statements could not be used to exculpate Holden without impermissibly inculcating Basile:

The only way to safeguard Holden's right to introduce the exculpatory evidence and at the same time protect Basile from evidence inadmissible against him . . . is to sever the trials of the two men.

The error was not cured by the opportunity that Holden later had to cross-examine Basile after he took the stand. The maximum that Holden could have realized from cross-examining Basile was a denial that Basile owned the marihuana [sic], with an opportunity to impeach that portion of Basile's testimony, and an admission that Basile had made exculpatory statements about him. The ability to bring out before the jury that Basile was a liar certainly did not cast Basile's exculpatory statements about Holden in an attractive light.

Id. at 1061 (citations omitted). *Cf. United States v. Olander*, 584 F.2d 876, 877 (9th Cir. 1978) (appellant's claim of right to separate trial disappeared when co-defendant, who made out-of-court statement implicating appellant, chose to testify at joint trial). See *United States v. Adams*, 531 F.2d 193, 197-198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978). The Ninth Circuit in *Adams* affirmed Pinkerton's conviction for conspiracy, assault, robbery and murder, and rejected his claim that joinder with Adams prejudiced his defense because it required the jury to consider evidence of one assault with which only Adams was charged. The *Adams* court concluded that Pinkerton had not carried the burden of demonstrating prejudice sufficient to require severance, stating that "[h]ere [Pinkerton] can show no prejudice other than that which necessarily inheres wherever multiple defendants or multiple charges are jointly tried. Furthermore, the instructions delivered to the jury were calculated to remove, to the extent possible, any prejudice resulting from joinder." *Id.* at 198 (footnote omitted).

716. *Cf. United States v. Sanchez*, 532 F.2d 155, 157-58 (9th Cir. 1976). In *Sanchez*,

defendant will provide testimony exculpating the defendant only if their trials are separate.⁷¹⁸

In 1978, the Ninth Circuit applied these precedents in several cases challenging denials of severance, and in no case found severance improperly denied. In *United States v. Brady*⁷¹⁹ for example, the Ninth Circuit affirmed appellants' convictions for voluntary manslaughter, concluding that neither had demonstrated a likelihood of prejudice sufficient to set aside the trial court's exercise of discretion in denying severance. In *Brady*, appellants' claims were based on two instances of rebuttal testimony in which a government agent testified about statements made out of court by each appellant, contradicting the in-court testimony given by each. Had the evidence consisted solely of the agent's testimony that each appellant had accused the other, out-of-court, of responsibility for the death, severance would have been required in order to prevent deprivation of sixth amendment confrontation rights. However, no such deprivation had occurred; each appellant who made an extrajudicial statement testified in court and subjected himself to cross-examination. The statements, therefore, failed to add " 'substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination', "⁷²⁰ and the *Brady* court con-

defendants Ruiz and Sanchez were jointly tried as co-conspirators in a scheme to sell heroin and opium. Although the evidence against Ruiz was thin, there was a strong case against Sanchez. Sanchez did not testify, but his attorney advised the jury that had Sanchez testified, he would have admitted the conspiracy charge. Sanchez's defense was entrapment. Since Sanchez did not testify, Ruiz had no opportunity to cross-examine. The jury was not cautioned that the confession was admissible only against Sanchez. The combination of a damaging admission, the lack of appropriate limiting instructions, and the absence of cross-examination were found by the Ninth Circuit to have deprived Ruiz of a fair trial.

717. See also *United States v. Brady*, 579 F.2d 1121 (9th Cir. 1978). The *Brady* court rejected appellants' contentions that their mutual antagonism had resulted in undue prejudice warranting severance, stating that "[w]hile a great disparity in proof may be sufficient to allow a severance in certain cases, the fact that the evidence against one co-defendant is more damaging than the evidence against another one is not a ground for severance." *Id.* at 1128. There can be no undue prejudice, therefore, if the jury can compartmentalize the evidence relating to each defendant, and consider the volume and limited admissibility of such evidence. *Id. Accord*, *United States v. Companale*, 518 F.2d 352, 359 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) (no undue prejudice if the jury can reasonably be expected to compartmentalize evidence as it relates to separate defendants in light of its volume and limited admissibility).

718. *United States v. Vigil*, 561 F.2d 1316, 1317 (9th Cir. 1977) (per curiam) ("When the reason for severance is the asserted need for a co-defendant's testimony, the defendant must show that he would call the co-defendant at a severed trial, that the co-defendant would in fact testify, and that the testimony would be favorable to the moving defendant." Once the defendant has satisfied this burden, he should be granted a separate trial.).

719. 579 F.2d 1121 (9th Cir. 1978).

720. *Id.* at 1129 (quoting *United States v. Bruton*, 391 U.S. 123, 128 (1968)).

cluded that the trial court had not abused its discretion in denying severance.⁷²¹

The defendant in *United States v. Uriarte*⁷²² appealed his conviction for conspiracy to import marijuana, contending that the admission of evidence concerning his co-defendant's previous arrest for possession of marijuana created an inference so prejudicial to him as to mandate severance. The *Uriarte* court, however, found no abuse of discretion in the trial court's denial of severance. No testimony had linked Uriarte to the evidence against his co-defendant and, as a safeguard, limiting instructions had been given regarding the permissible use of the evidence of the co-defendant's previous arrest. The Ninth Circuit therefore found that a joint trial was not unduly prejudicial to the appellant, concluding that "[s]imilar cases have arisen where members of the conspiracy who . . . were not involved in all aspects of the conspiracy, have been denied severance. This court has not found it impossible to try co-conspirators together, even when not all of the evidence admitted applied to each co-conspirator."⁷²³

In *United States v. Hernandez-Berceda*,⁷²⁴ the Ninth Circuit affirmed the appellant's conviction for conspiracy to import heroin, concluding that his asserted need for a co-indictee's testimony warranted neither severance nor continuance. The court held that when the reason asserted for severance or continuance "is the need for a codefendant's testimony, [either] should be granted upon a showing that (1) the codefendant would be called; (2) he would in fact testify; and (3) the testimony would be favorable to the requesting defendant."⁷²⁵ In *Hernandez*, a co-indictee, Barron, had offered to provide exculpatory testimony for the appellant, but only if their trials were separate. On this basis the appellant requested severance of their joint trial. Shortly before trial, however, Barron pleaded guilty, and appellant changed his

721. Severance was also held to have been properly denied despite each appellant's contention that the other's antagonistic testimony had been unduly prejudicial to him. The court stated that "[c]onflicting and antagonistic defenses being offered at trial do not necessarily require granting a severance, even if hostility surfaces or defendants seek to blame one another." *Id.* at 1128. The *Brady* court concluded that neither appellant was unduly prejudiced by the testimony of the other. It was undisputed that both had participated in the incident and "[c]onsequently, it would be only natural for one to try to place the blame on the other [T]here is no sound reason to suggest that the members of the jury, being properly instructed as they were, could not realistically appraise the evidence against each appellant." *Id.*

722. 575 F.2d 215 (9th Cir.), *cert. denied*, 439 U.S. 963 (1978).

723. *Id.* at 217 (citations omitted).

724. 572 F.2d 680 (9th Cir. 1978).

725. *Id.* at 682.

motion for severance to one for continuance, maintaining that Barron would only provide the exonerating testimony after he was sentenced. Applying to this motion for continuance the standards governing a motion for severance in order to obtain a co-defendant's testimony, the Ninth Circuit concluded that a sufficient showing of prejudice had not been established. The *Hernandez-Berceda* court reasoned that because of an agreement that other outstanding charges against him were to be dropped, Barron had no real incentive for postponing testifying. A reasonable doubt existed as to whether Barron would testify, and the trial court, therefore, did not abuse its discretion in denying the motion for a continuance.

C. Conduct of the Trial

1. Conduct of the trial judge

The trial court judge is more than a moderator during the life of the trial.⁷²⁶ It is incumbent upon a judge to ensure that the trial is conducted fairly.⁷²⁷ To do so, he is vested with a broad range of discretionary powers⁷²⁸ in order to meet situations as they arise during the course of the trial.⁷²⁹

a. Pre-trial proceedings

Unless hearing a motion, the trial court judge usually is not involved to a significant degree in pre-trial proceedings. The judge, however, has considerable latitude in dealing with these motions. The trial court in its discretion may properly dismiss the indictment of a federal grand

726. *Quercia v. United States*, 289 U.S. 466, 469 (1933) (error for judge to instruct jury that defendant was lying because he wiped hands repeatedly while testifying); *United States v. James*, 576 F.2d 223, 228 (9th Cir. 1978) ("[Judges] are not referees at prize-fights but functionaries of justice.") (quoting *Johnson v. United States*, 333 U.S. 46, 54 (1948)); *United States v. Aguiar*, 472 F.2d 553, 555 (9th Cir. 1972) (per curiam) ("[A] trial judge is more than a moderator or umpire. His responsibility is to preside in the manner and with the demeanor to provide a fair trial to all parties and his discretion in the performance of this duty and management is wide.") (citations omitted).

727. *See, e.g.*, *United States v. Eldred*, 588 F.2d 746, 749 (9th Cir. 1978) ("A trial judge must constantly be aware of the sensitive role he plays . . . and avoid even the appearance of advocacy or partiality.").

728. *See, e.g.*, *United States v. Marshall*, 532 F.2d 1279, 1286 (9th Cir. 1976) (trial judge's discretion in the management of the trial is broad); *Roseman v. United States*, 364 F.2d 18, 27 (9th Cir. 1966) (conduct of trial is always a matter within the discretion of the trial court judge).

729. *See Geders v. United States*, 425 U.S. 80, 86 (1976) ("The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process.").

jury,⁷³⁰ decide questions involving the Federal Rules of Criminal Procedure,⁷³¹ and rule on motions for change of venue.⁷³² The court further is empowered to disqualify the prosecutor,⁷³³ to protect against the

730. *United States v. King*, 586 F.2d 847 (9th Cir. 1978) (No. 78-1230; unpublished opinion) (court can dismiss indictment if an essential element of the charged offense is not charged); *United States v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978) (a federal court using "its inherent supervisory powers" can dismiss indictment obtained as a result of prosecutor's impropriety). See *United States v. Giese*, 597 F.2d 1170, 1177 (9th Cir. 1979) (indictment must contain the elements of offense to be charged and sufficiently apprise defendant of charges against him) (quoting *Russell v. United States*, 369 U.S. 749, 763-64 (1962)); *United States v. Lyman*, 592 F.2d 496, 500 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2864 (1979) (striking of overt acts from indictment charging conspiracy held proper as it did not materially alter nature of indictment) (citing *United States v. Dawson*, 516 F.2d 796, 804 (9th Cir.), *cert. denied*, 423 U.S. 855 (1975)). Cf. *United States v. Fried*, 576 F.2d 787, 792 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978) (trial court cannot inquire into sufficiency of evidence presented to grand jury).

731. The trial court has wide discretion in dealing with motions for severance. *E.g.*, *United States v. Olander*, 584 F.2d 876, 885 (9th Cir. 1978) (trial court has considerable discretion in criminal contempt case to grant or deny severance); *United States v. Adams*, 581 F.2d 193, 197 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) (rule 14 motions for severance are committed to sound discretion of trial court); *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978) (test on appeal of denial of severance motion is whether joint trial would be so prejudicial to defendant as to require exercise of trial court's discretion in only one way, to order a separate trial); *United States v. McDonald*, 576 F.2d 1350, 1355 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978) (decision on rule 14 severance is within sound discretion of the trial court); *United States v. Hernandez-Berceda*, 572 F.2d 680, 682 (9th Cir. 1978) (trial court has wide discretion to grant severance); *United States v. Barney*, 568 F.2d 134, 136 (9th Cir.) (per curiam), *cert. denied*, 435 U.S. 955 (1978) (joinder did not violate FED. R. CRIM. P. 8(b) as nothing made joinder unduly prejudicial); *United States v. Gay*, 567 F.2d 916, 919 (9th Cir. 1978) (rule 14 severance is entirely within trial court's discretion).

The trial court judge has considerable discretion to direct discovery. See *United States v. Dipp*, 581 F.2d 1323, 1327 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 841 (1979) (trial court judge has broad discretion in determining sanctions for rule 16 violations); *United States v. Rich*, 580 F.2d 929, 934 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (denial of rule 15 motion is well within the discretion of the trial court); *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978) (trial court could not properly enter discovery orders before a case or controversy arose); *United States v. Gillings*, 568 F.2d 1307, 1310 (9th Cir.) (per curiam), *cert. denied*, 436 U.S. 919 (1978) (sanctions for violating pretrial discovery rules are largely within trial court's discretion).

The trial court judge also is broadly vested with discretion in other areas. *E.g.*, *United States v. Dreitzler*, 577 F.2d 539, 545 (9th Cir. 1978) (district court has limited discretion in resolving a rule 29(c) motion); *United States v. Charnay*, 577 F.2d 81, 84 (9th Cir. 1978) (dismissal with prejudice under rule 48(b) calls for trial court's sensitive exercise of discretion); *Fassler v. Moran*, 576 F.2d 1372, 1373 (9th Cir. 1978) (per curiam) (trial court may not extend time for rule 59(b), (d) & (e) motions except as provided in the rule); *United States v. Barron*, 575 F.2d 752, 756 (9th Cir. 1978) (rule 12.1 allows trial judge to exclude defendant's alibi defense if notification is but one day late if the judge has weighed the interest of the defendant in a full and fair trial against the interests of avoiding surprise and delay).

732. *United States v. Dreitzler*, 577 F.2d 539, 552 (9th Cir. 1978) (decision on change of venue motion is within sound discretion of the trial court).

733. *United States v. Weiner*, 578 F.2d 757, 767 (9th Cir.), *cert. denied*, 439 U.S. 981

effects of excessive pre-trial publicity,⁷³⁴ and to allow hearings to determine a defendant's competency.⁷³⁵

When an accused challenges a judge's ability to hear his case by a 28 U.S.C. section 144⁷³⁶ motion alleging that the judge is biased, the judge may properly rule on the legal sufficiency of the supporting affidavit. In *United States v. Azhocar*,⁷³⁷ the Ninth Circuit held that only after the legal sufficiency of an affidavit alleging bias has been affirmatively determined must the trial judge withdraw from the case.⁷³⁸ The *Azho-*

(1978) (mere fact that attorney now working for Securities and Exchange Commission once worked for law firm that had previously represented defendant does not necessarily disqualify United States Attorney's Office from the action). The *Weiner* court held that to disqualify the Government, the defendant would have to show: (1) that the attorney in question could have imputed to him the knowledge of the previous case possessed by the other members of his law firm, (2) that this knowledge also could be imputed to the other attorneys at the Securities and Exchange Commission, and (3) that this knowledge could be imputed to the United States Attorney's Office through the alleged cooperation between it and the Securities and Exchange Commission.

734. *United States v. Eldred*, 588 F.2d 746, 751 (9th Cir. 1978) (in light of the kind of publicity and length of elapsed time involved, any possible juror prejudice stemming from newspaper articles four and twelve months prior to trial would have been detected by judge's inquiries of the prospective panel of jurors); *United States v. McDonald*, 576 F.2d 1350, 1354 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978) (trial court is given wide latitude in gauging effects of pretrial publicity on prospective jurors). *Cf. United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (restraining order on media prior to any attempted contact with jurors has a heavy presumption against its constitutionality) ("The government . . . must show that the activity restrained poses a clear and present danger or a serious and imminent threat to a protected competing interest . . .").

735. *Compare United States v. Richardson*, 586 F.2d 661, 667 (9th Cir. 1978) (denial of competency hearing held not an abuse of discretion) with *United States v. Ives*, 574 F.2d 1002, 1005 (9th Cir. 1978) (trial court abused its discretion in not considering proffered evidence of change in defendant's competency when there had been four differing determinations of defendant's competency within five months).

736. 28 U.S.C. § 144 (1976) states in part:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

737. 581 F.2d 735, 739 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1213 (1979) (neither adverse rulings nor merely ill-advised remarks are sufficient to show bias). *See also United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (bias must result from an extra-judicial source).

738. 581 F.2d at 738. The court rejected the claim that the trial judge can decide only the timeliness of the affidavit and must assign the § 144 motion to another judge for hearing on the sufficiency of the affidavit. *Id. See Berger v. United States*, 255 U.S. 22, 36 (1921) (judge against whom bias affidavit is filed may properly rule on that affidavit's legal sufficiency); *United States v. Olander*, 584 F.2d 876, 883 (9th Cir. 1978) ("Only if [the judge] finds [the affidavit legally] sufficient is he required to have another judge hear the motion."). *See also United States v. Cassasa*, 588 F.2d 282, 284 (9th Cir. 1978) ("The facts indicating bias must be substantial.").

car court employed a three-step test by which to test the legal sufficiency of the affidavit:

It must state facts which if true fairly support the allegation that bias or prejudice stemming from (1) an extrajudicial source (2) may prevent a fair decision on the merits. The focus is not only on the source of the facts and their distorting effects on a decision on the merits . . . but also on (3) the substantiality of the support given by these facts to the allegation of bias⁷³⁹

In *United States v. Olander*⁷⁴⁰ the Ninth Circuit applied the same standard to a 28 U.S.C. section 455⁷⁴¹ motion alleging that the judge's impartiality might reasonably be questioned.⁷⁴²

b. Discretion during the trial

The trial court judge, in controlling the flow of information to the jury, may exercise a wide latitude of discretion when ruling on admissibility of evidence,⁷⁴³ interpreting the Federal Rules of Evidence,⁷⁴⁴

739. 581 F.2d at 739-40.

740. 584 F.2d 876, 883 (9th Cir. 1978) (newspaper article that did not quote trial court judge directly but was rather the "figurative interpretation" of a person interviewed by a newspaper reporter held insufficient to allege impartiality).

741. 28 U.S.C. § 455 (1976) states in relevant part: "(a) Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself . . . : (1) Where he has a personal bias or prejudice concerning a party"

742. 584 F.2d at 882 ("We agree with the Fifth Circuit that . . . the test for bias or prejudice is the same under both statutes."). See *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975) (test for disqualification of judge is same for motions made pursuant to §§ 144-145).

743. *United States v. Cassasa*, 588 F.2d 282, 285 (9th Cir. 1978) ("A trial judge is allowed great discretion in determining whether to admit evidence as relevant . . . and he may exclude evidence that is 'too flimsy'.").

The trial court has discretion in deciding whether to admit sound recordings into evidence. See *United States v. King*, 586 F.2d 847 (9th Cir. 1978) (No. 78-1230; unpublished opinion) (sound recordings deemed admissible). The Ninth Circuit has articulated a standard for the admission of sound recordings, holding that "the trial court, in the exercise of its judicial discretion, must be satisfied that the recording is accurate, authentic, and generally trustworthy." *Id.* The *King* court specifically rejected the addition of requiring a finding of voluntariness vis-à-vis the making of the statement recorded. *Id.* Cf. *United States v. McKeever*, 169 F. Supp. 426, 430 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F.2d 669 (2d Cir. 1959) (proponent must lay proper foundation to admit sound recording, including that the conversation elicited was made voluntarily). Instead, the Ninth Circuit has held that voluntariness goes to the trustworthiness of the recording and its probative value. *United States v. King*, 586 F.2d 847 (9th Cir. 1978) (No. 78-1230; unpublished opinion). See also *United States v. Rinn*, 586 F.2d 113, 117-18 (9th Cir. 1978) (tape recordings admissible after judge determined that "one could pick up and follow what was on them;" judge properly allowed jury to use prosecution transcripts to aid in understanding the tapes when judge corrected errors in the transcript and instructed the jury "that it was the tape recordings, not the transcript, which were controlling").

minimizing potentially prejudicial publicity,⁷⁴⁵ deciding whether to recess the court or to sequester the jury,⁷⁴⁶ and dealing with jury misconduct.⁷⁴⁷ Although the judge is allowed to comment on the evidence

The trial court judge has discretion in admitting polygraph results, *United States v. McIntyre*, 582 F.2d 1221, 1226 (9th Cir. 1978) (admissibility of polygraph results for even a limited purpose is within the judge's wide discretion), *United States v. Radlick*, 581 F.2d 225, 229 (9th Cir. 1978) (polygraph results admissible only in trial court's discretion), and in the admission of in-court identifications, *United States v. Satterfield*, 572 F.2d 687, 690 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978) (admission of in-court identification of defendant in bank robbery case was in court's discretion).

744. *See, e.g.*, *United States v. Spaulding*, 588 F.2d 669, 670 (9th Cir. 1978) (gun that had probative value admitted into evidence in mail extortion case was an exercise of the court's discretion); *United States v. Radlick*, 581 F.2d 225, 229 (9th Cir. 1978) (previous conversations held admissible in trial court's discretion by rule 404(b)); *United States v. Espinoza*, 578 F.2d 224, 227-28 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 849 (1978) (admission of prior similar acts by defendant in accordance with rule 404(b) was not error absent a showing of an abuse of discretion); *United States v. Walls*, 577 F.2d 690, 696-97 (9th Cir.), *cert. denied*, 439 U.S. 893 (1978) (danger of prejudice outweighing probative value of proffered evidence to show a common plan or scheme by defendant's prior conduct is a decision committed to the sound discretion of the trial court); *United States v. Phillips*, 577 F.2d 495, 501 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) (determination of general relevancy of evidence for rule 403 is within trial court's discretion); *United States v. McDonald*, 576 F.2d 1350, 1356 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978) (whether probative value of evidence of defendant's prior actions to show knowledge and motive outweighs potential prejudicial impact is a decision committed to the sound discretion of the trial court); *United States v. Peele*, 574 F.2d 489, 491 (9th Cir. 1978) (determination of witness' competency lies in court's discretion); *United States v. Young*, 573 F.2d 1137, 1140 (9th Cir. 1978) (rule 404(b) balance in admitting evidence of defendant's prior acts is generally a matter of the judge's discretion); *United States v. Shields*, 571 F.2d 1115, 1118-19 (9th Cir. 1978) (refusal to exercise discretion under rule 403 to exclude evidence of witness' prior silence to impeach his testimony held proper when judge's curative instructions minimized possibility of consideration of defendant's silence); *United States v. Kizer*, 569 F.2d 504, 506 (9th Cir.), *cert. denied*, 98 S. Ct. 1626 (1978) (court's exercise of discretion in closing off impeachment was not improper); *United States v. Curtis*, 568 F.2d 643, 645 (9th Cir. 1978) (rule 403 balance and procedure is within sound discretion of the trial court).

745. *See also* *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) ("If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."); *United States v. Eldred*, 588 F.2d 746, 751 (9th Cir. 1978) (admonishment to jury to avoid news regarding trial held proper).

746. 588 F.2d at 752.

747. *See, e.g.*, *United States v. Moore*, 580 F.2d 360, 365 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978) (when defendant "believed that one or more jurors had missed significant portions of the summation, the onus was on him to ask the court to do something about it. . . . [I]n not conducting an examination of the juror *sua sponte*, the court did not abuse its considerable discretion in this area.") (citations omitted); *United States v. Weiner*, 578 F.2d 757, 765 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (when juror initiated a conversation with the bailiff asking if the judge expected a verdict and the bailiff answered that he didn't know, it was not an abuse of discretion to deny the motion for a new trial as there was no prejudice); *United States v. Avila-Macias*, 577 F.2d 1384, 1387 (9th Cir. 1978) (juror who passed by outside a bar wherein alleged drug buy took place not precluded from serving on panel) ("The trial judge acted within appropriate limits of his discretion in appraising the

presented to the jury⁷⁴⁸ and to question the witnesses,⁷⁴⁹ such comments or questions should not be arbitrary and must comport with the standards governing a judge's office.⁷⁵⁰

In 1978, the Ninth Circuit in *United States v. Adams*⁷⁵¹ set a standard for the admissibility of statements made under hypnosis used to refresh a witness' memory. Addressing a question of first impression, the *Adams* court applied the civil trial standard: the condition of hypnosis bears on credibility rather than admissibility.⁷⁵²

Great care must be taken, however, to ensure that the statements were the product of the witness' own recollection and not the result of suggestions given while under hypnosis.⁷⁵³ Failure to disclose the state of hypnosis is highly prejudicial, however, and may result in the grant of a new trial.⁷⁵⁴

probability of prejudice and the nature of any initiative he felt impelled to take in the matter.").

748. See *Quercia v. United States*, 289 U.S. 466 (1933), wherein the Court observed: It is within [the trial court's] province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.

Id. at 469. See also *United States v. James*, 576 F.2d 223, 228-29 (9th Cir. 1978) (comment to jury indicating that elements of offenses were established held not to be error) (quoting *Quercia v. United States*, 289 U.S. 466, 486 (1933)).

749. *United States v. Eldred*, 588 F.2d 746, 749 (9th Cir. 1978) ("A trial judge may participate in the examination of witnesses for the purpose of 'clarifying the evidence, controlling the orderly presentation of evidence, confining counsel to evidentiary rulings, and preventing undue repetition of testimony.' . . . Unless his intervention prejudiced the accused, [there is no error].") (quoting *United States v. Malcolm*, 475 F.2d 420, 427 (9th Cir. 1973)); *United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978) (judge may properly question a witness to develop facts and clarify questions as long as it is done in a non-prejudicial manner and the court does not become "personally over-involved").

750. *United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978). See, e.g., *United States v. Miroyan*, 577 F.2d 489, 494 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (any possible prejudice resulting from judge's comment neutralized by curative instruction). Cf. *United States v. Cassasa*, 588 F.2d 282, 285 (9th Cir. 1978) (counsel's absence during judge-jury communication on a routine matter held as harmless error as no prejudice could have resulted).

751. 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) (memory of witness in criminal trial may properly be refreshed with statements made while under hypnosis).

752. *Id.* See also *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1069 (9th Cir. 1975) (*per curiam*) (witness whose memory was refreshed by statements made while under hypnosis was not incompetent to testify in automobile accident case).

753. 581 F.2d at 199.

754. *Id.* See also *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969) (failure to disclose hypnosis of witness in criminal action requires a new trial) ("The test . . . is not how the newly discovered evidence concerning the hypnosis would affect the trial judge . . . but whether . . . there was a significant chance that this added item . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.").

The most effective tool the judge has for controlling the jury is his power⁷⁵⁵ to instruct the jury as to the applicable law of the case prior to its deliberations. The jury must be instructed fairly as to the theories of the case, although not necessarily in the precise language requested by counsel.⁷⁵⁶ The wide scope of discretion allowed the trial judge in this area is demonstrated by the standards employed on appellate review. Although an instruction may be given or omitted erroneously, it will not be held to be error if it is later withdrawn,⁷⁵⁷ a curative instruction given,⁷⁵⁸ or if the jury is not misled by it.⁷⁵⁹ Instructions are reviewed as a whole,⁷⁶⁰ in the context of the entire trial.⁷⁶¹ The jury is presumed

755. See *United States v. Johnson*, No. 77-3808, slip op. at 4122 (9th Cir. Dec. 19, 1978) ("The duty to instruct the jury extends to the accurate definition of words and phrases having technical meanings."). See *United States v. Carman*, 577 F.2d 556, 563 (9th Cir. 1978) (jury instructions must accurately state the applicable law); *United States v. James*, 576 F.2d 223, 226 (9th Cir. 1978) (although criminal defendant is allowed to have jury instructed on his theory of the case, judge is given substantial latitude to tailor the instructions to cover fairly and adequately the issues presented).

756. *United States v. Lone Bear*, 579 F.2d 522, 524 (9th Cir. 1978) (jury instructions that contain "only insignificant wording changes" from those proposed by defendant are not an abuse of discretion) (citing *United States v. James*, 576 F.2d 223, 226 (9th Cir. 1978)); *United States v. James*, 576 F.2d 223, 226 (9th Cir. 1978) (neither party may insist upon any particular language in the jury instructions); *United States v. Lyman*, 592 F.2d 496, 504 (1978) ("Lyman was not entitled to an instruction that unduly restricted the possible factual bases of criminal liability."). Cf. *United States v. Seymour*, 576 F.2d 1345, 1348 (9th Cir.), *cert. denied*, 439 U.S. 857 (1978) (judge can refuse to give defendant's requested instructions if the jury charge in its entirety adequately covers the theory of defense offered at trial).

757. *United States v. Collom*, No. 77-1040, slip op. at 1870 (9th Cir. June 15, 1978) (withdrawal of instructions improperly before jury held proper if no doubt is left in the jury's mind as to what the court declares the law to be).

758. *United States v. Dreitzler*, 577 F.2d 539, 548 (9th Cir. 1978) (judge must provide jury with corrected instructions if the first instructions did not adequately cover all elements charged in the indictment); *United States v. Walker*, 575 F.2d 209, 213 (9th Cir.), *cert. denied*, 439 U.S. 931 (1978) (supplemental instructions must eliminate jury confusion). See *United States v. Bayer*, 331 U.S. 532, 536 (1947) (amplification of the jury charge is in the judge's discretion once an accurate and correct charge is given).

759. *United States v. Boettjer*, 569 F.2d 1078, 1083 (9th Cir.), *cert. denied*, 435 U.S. 976 (1978) ("Imprecision of statement and inexactness of language in the jury instructions is not reversible error, unless the jury is misled.") (quoting *Pittman v. United States*, 368 F.2d 560, 560-61 (9th Cir. 1966) (per curiam), *cert. denied*, 386 U.S. 995 (1967)).

760. *Stoker v. United States*, 587 F.2d 438, 440 (9th Cir. 1978) (per curiam) (on review jury instructions must be considered as a whole); *United States v. Allen*, 579 F.2d 531, 533 (9th Cir. 1978) (jury instructions must be examined as a whole); *United States v. Walls*, 577 F.2d 690, 697 (9th Cir.), *cert. denied*, 439 U.S. 893 (1978) (consider jury instructions together to determine whether omission of one instruction was an abuse of discretion); *United States v. Dreitzler*, 577 F.2d 539, 549 (9th Cir. 1978) (there is no error when "the instructions as a whole communicate the proper notion of [the crime charged] in understandable terms"); *United States v. Seymour*, 576 F.2d 1345, 1348 (9th Cir.), *cert. denied*, 439 U.S. 857 (1978) ("[T]he adequacy of the jury instructions is not to be determined by the giving, or failure to give, any one or more instruction, but by examining the instructions as a whole."); *United*

to have followed the judge's instructions.⁷⁶² The court's exercise of discretion in this area will be disturbed only if it is found that the instructions prejudiced, misled, or coerced the jury,⁷⁶³ or if they constitute plain error.⁷⁶⁴

To obtain a fair trial for all parties, the trial judge has discretion to control the actions of all trial participants. Limiting instructions⁷⁶⁵ and admonishments⁷⁶⁶ to the jury, and control of cross-examination,⁷⁶⁷ ar-

States v. Crawford, 576 F.2d 794, 799 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 851 (1978) ("[T]he question presented here is whether the erroneous impression given by a fair reading of the instruction is cured elsewhere, considering the jury charge as a whole."); United States v. James, 576 F.2d 223, 227 (9th Cir. 1978) (the adequacy of the entire charge must be reviewed in the context of the entire trial); United States v. Strand, 574 F.2d 993, 996 (9th Cir. 1978) (court's instructions are considered as a whole in determining whether jury was correctly and clearly charged).

761. See also United States v. Park, 421 U.S. 658, 674 (1975) ("[A] single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.") (quoting Cupp v. Naughten, 414 U.S. 141, 146-47 (1973)).

762. United States v. Eldred, 588 F.2d 746, 752 (9th Cir. 1978) (faithful performance by the jurors of their duty must be presumed); United States v. Price, 577 F.2d 1356, 1366 (9th Cir. 1978) (jury assumed to have followed the court's instructions); United States v. Strand, 574 F.2d 993, 996 (9th Cir. 1978) ("We must presume that the jury followed the court's instruction.").

763. United States v. Cassasa, 588 F.2d 282, 286 (9th Cir. 1978) (suggestion by caretaking judge on Friday afternoon that the deadlocked jury recess until Monday held not coercive); Stoker v. United States, 587 F.2d 438, 440 (9th Cir. 1978) (per curiam) (standard on review is whether the instructions to the jury were misleading); United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978) (per curiam) (prejudicial error regarding jury instructions merits reversal); United States v. Jones, 569 F.2d 499, 501 (9th Cir.), *cert. denied*, 98 S. Ct. 2243 (1978) (instructions on willfulness held not in error as they accurately explained the applicable legal standard to the jury).

764. United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978) (plain error in jury instructions merits reversal). See also United States v. King, 586 F.2d 847 (9th Cir. 1978) (No. 78-1230; unpublished opinion) (failure to instruct the jury on every element of the charged offense is harmless error only if that element upon which the jury was not instructed is undisputed).

765. United States v. Miroyan, 577 F.2d 489, 494 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (jury carefully instructed not to consider judge's statement to panel of prospective jurors); United States v. Segovia, 576 F.2d 251, 253 (9th Cir. 1978) (instruction on the limited purpose for which evidence could be used should have been given, absence thereof not held to be reversible error in context of this case); United States v. James, 576 F.2d 223, 229 (9th Cir. 1978) (judge's instructions properly limit the effect of his own comments on evidence); United States v. Sigal, 572 F.2d 1320, 1323 (9th Cir. 1978) (cautionary instruction immediately following introduction of evidence limiting the purpose for which that evidence could be admitted minimized any prejudice).

766. See, e.g., United States v. Eldred, 588 F.2d 746, 752 (9th Cir. 1978) (admonishment given to jury to avoid publicity pertaining to the trial).

767. United States v. Adams, 581 F.2d 193, 199-200 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) (curtailment of cross-examination is within the judge's discretion); United States v. Weiner, 578 F.2d 757, 766 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 981 (1978) (judge in securities fraud case can control extent and scope of cross-examination to preclude repetitive

guments to the jury,⁷⁶⁸ and the admissibility of evidence⁷⁶⁹ are some of the principal devices employed by the judge. The court has further discretion to grant or deny continuances,⁷⁷⁰ control the court's calendar,⁷⁷¹ reveal the identity of an informant,⁷⁷² and exclude witnesses from the courtroom.⁷⁷³ The contempt power⁷⁷⁴ and the power to ex-

questioning and time-wasting exploration of collateral matters; judge will not be reversed for curbing cross-examination unless by so doing he denies defendant's constitutional right to confrontation). *See also* United States v. Lara-Hernandez, 588 F.2d 272, 274 (9th Cir. 1978) (per curiam) (sixth amendment does not give defendant a right to unlimited cross-examination). *But cf.* United States v. Alvarez-Lopez, 559 F.2d 1155, 1159 (9th Cir. 1977) (limit on cross-examination was too severe and amounted to a denial of defendant's sixth amendment right of confrontation).

768. *See* United States v. Eldred, 588 F.2d 746, 750 (9th Cir. 1978) (judge's limitations on counsel held as error only if it appears "that the conduct measured by the facts of the case presented together with the results of the trial was clearly prejudicial"); United States v. Sturgis, 578 F.2d 1296, 1300 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978) ("Not only should a judge interfere with an attorney's closing argument when it is 'legally wrong,' but he should also limit, for example, attorneys' remarks outside the record or unduly inflammatory."); United States v. Kim, 577 F.2d 473, 484 (9th Cir. 1978) (when prosecutor read entire indictment to jury, and judge properly instructed the jury that indictment was not evidence, there was no error); United States v. Barron, 575 F.2d 752, 758 (9th Cir. 1978) (closing argument beyond the evidence properly curtailed by the judge); United States v. Carreon, 572 F.2d 683, 686 (9th Cir. 1978) (per curiam) (judge who continually interrupted defense counsel's arguments sua sponte and who sustained his own objections to defense counsel's questions, deprived defendant of a fair trial).

769. *See* note 743 *supra*.

770. *See* United States v. Powell, 587 F.2d 443, 447 (9th Cir. 1978) (trial court has broad discretion in granting or denying continuances); United States v. Charnay, 577 F.2d 81, 83 (9th Cir. 1978) ("The decision whether to continue a trial to enable a party to procure an absent witness rests in the sound discretion of the trial court . . ."); United States v. Hoyos, 573 F.2d 1111, 1114 (9th Cir. 1978) (decision to grant or deny continuance to allow defendant to obtain witness is within trial court's discretion); United States v. Hernandez-Berceda, 572 F.2d 680, 682 (9th Cir. 1978) (trial court's discretion to grant or deny continuance is not without limits); United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978) (trial court's grant or denial of continuance reversible only for abuse of discretion).

771. United States v. Olander, 584 F.2d 876, 885 (9th Cir. 1978) ("The court has control of its own calendar . . ."); United States v. Barney, 568 F.2d 134, 136 (9th Cir.) (per curiam), *cert. denied*, 435 U.S. 955 (1978) (in response to exigencies created by court calendar, judge may allow less than the 10-day maximum for defendant to file objections to magistrate's recommendations).

772. United States v. Hernandez-Berceda, 572 F.2d 680, 682-83 (9th Cir. 1978) (revelation of informant's identity is within trial court's discretion; court must carefully balance defendant's interest in preparing defense against safety of informant).

773. United States v. Robbins, 579 F.2d 1151, 1154 (9th Cir. 1978) (not a breach of judge's discretion when witness present despite exclusion order allowed to testify); United States v. Avila-Macias, 577 F.2d 1384, 1389 (9th Cir. 1978) (judge has power to exclude witnesses from courtroom) ("[A]ppropriate sanction for violation of witness exclusionary rule is a matter which lies within the sound discretion of the trial court."). *Cf.* United States v. Torbert, 496 F.2d 154, 158 (9th Cir.), *cert. denied*, 419 U.S. 857 (1974) ("[I]t is ordinarily an abuse of discretion to disqualify a witness unless the defendant or his counsel have somehow cooperated in the violation of the order.").

774. *See* notes 779-84 *infra* and accompanying text.

clude the defendant from the courtroom⁷⁷⁵ are more extreme sanctions available to the trial judge.

c. Limitations on discretion

The discretion of the trial court, however, is not without limitations. The judge must specifically find waivers of constitutional rights prior to trial,⁷⁷⁶ must ensure the defendant's right to counsel in deportation proceedings,⁷⁷⁷ and must honor state findings of historical fact in habeas corpus actions.⁷⁷⁸

775. *United States v. Kizer*, 569 F.2d 504, 506-07 (9th Cir.), *cert. denied*, 98 S. Ct. 1626 (1978) (judge properly acted within his discretion in ordering defendant, who continued to argue with judge in front of jury after being warned, removed from courtroom). *See Illinois v. Allen*, 397 U.S. 337, 343 (1970) (defendant can lose right to be present at trial by continuing disruptive behavior) ("We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.").

776. *United States v. Aponte*, 591 F.2d 1247, 1250 (9th Cir. 1978) (court's allowing defendant to represent self without a specific finding of waiver by defendant of right to counsel before trial held to be error) ("Although a trial judge's failure to make a specific waiver inquiry is not *per se* reversible error . . . [i]t will be only the rare case . . . in which an adequate waiver will be found on the record in the absence of a specific inquiry by the trial judge."). *See United States v. Gillings*, 568 F.2d 1307, 1309 (9th Cir.) (*per curiam*), *cert. denied*, 436 U.S. 919 (1978) (defendant in tax protest case cannot proceed *pro per* unless the court finds through interrogation of defendant that he "understands the charges and the manner in which an attorney can be of assistance. The defendant must be aware that he or she will be on his or her own in a complex area where experience and professional training are greatly to be desired.").

777. *Castro-Nuno v. INS*, 577 F.2d 577, 579 (9th Cir. 1978) (absent waiver of statutory right to counsel in deportation hearing, judge *sua sponte* should have continued the hearing until defendant was properly represented); *United States v. Barraza-Leon*, 575 F.2d 218, 222 (9th Cir. 1978) (immigration judge must inform defendant of apparent grounds for relief from deportation; this duty satisfied when judge told defendant that defendant could retain counsel and present any evidence he wished against deportation). *See also Cuevas-Ortega v. INS*, 588 F.2d 1274, 1278 (9th Cir. 1978) (once an alien has been adjudicated deportable, voluntary departure is wholly within immigration judge's discretion).

778. *See Taylor v. Cardwell*, 579 F.2d 1380, 1382-83 (9th Cir. 1978) (the district court must accept state court findings of fact if made after a full and fair hearing and if they have substantial support in the record). *Cf. Chard v. United States*, 578 F.2d 1317, 1318 (9th Cir. 1978) (district court's refusal to conduct full evidentiary hearing on whether defendant had been properly informed of appeal rights not error when same issue had been raised previously and rejected as frivolous); *Myers v. Rhay*, 577 F.2d 504, 509 (9th Cir.) (*per curiam*), *cert. denied*, 439 U.S. 968 (1978) (if state court has provided a constitutionally adequate hearing, it is within trial court's discretion to hold evidentiary hearing on voluntariness of defendant's waiver); *Stone v. Cardwell*, 575 F.2d 724, 726 (9th Cir. 1978) (state court findings of fact are presumably correct but may be disturbed upon showing material facts not adequately developed or factual determinations not fairly supported by the record); *Pierce v. Cardwell*, 572 F.2d 1339, 1342 (9th Cir. 1978) (district court must grant an evidentiary hearing if the facts were not resolved at the state court level). *See also Townsend v. Sain*, 372

In *Hawk v. Cardoza*⁷⁷⁹ the Ninth Circuit significantly limited the criminal contempt power⁷⁸⁰ of the trial court judge. Adopting the Seventh Circuit's position,⁷⁸¹ the Ninth Circuit now requires that "some sort of actual damaging effect on judicial order [be found] before one may be held in criminal contempt."⁷⁸² The *Hawk* court concluded that a reading of the fourteenth amendment in conjunction with the first amendment allows a finding of contempt of court only if the offensive conduct was intentionally contemptuous. The favored procedure in these cases is not to mete out a summary sentence of criminal contempt,⁷⁸³ but to give the contemner reasonable notice of the specific charges against him and to give him a chance to be heard in his own behalf.⁷⁸⁴

d. Discretion in post-trial proceedings

The trial judge's discretionary powers in most post-trial proceedings mirror those he had during the trial.⁷⁸⁵ One area of this discretion involves the declaration of mistrials. If, in the court's discretion, "there is

U.S. 293, 309 n.6 (1963) ("By 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . .'" (citation omitted)).

779. 575 F.2d 732, 734 (9th Cir. 1978) (per curiam) ("[W]e infer that fourteenth amendment due process, incorporating the first amendment, does demand some showing of intent for conviction of criminal contempt.").

780. See, e.g., *Mayberry v. Pennsylvania*, 400 U.S. 455, 462-63 (1971) (criminal contempt is the appropriate remedy for conduct not befitting an American courtroom).

781. *Id.* See *In Re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972).

782. 575 F.2d at 735.

783. *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-66 (1971). If the contemner is the defense counsel, the court must strike a balance among the competing constitutional interests. 575 F.2d at 735 (rights guaranteed by the first, sixth, and fourteenth amendments must be balanced if the contemner is the defendant's attorney).

784. See *Taylor v. Hayes*, 418 U.S. 488, 500 (1974) (elementary due process must be accorded the contemner although the full scale of trial rights would be inappropriate).

It is also the favored procedure to have the contempt proceedings before a judge different from the one involved in the controversy. *Cooke v. United States*, 267 U.S. 517, 539 (1925). See also *Taylor v. Hayes*, 418 U.S. 488, 501-02 (1974) (a different judge should try the contempt proceeding if the original judge has become embroiled in a running controversy).

785. When sentencing the defendant, for example, the judge retains broad discretion. See *United States v. Lincoln*, 581 F.2d 200, 201-02 (9th Cir. 1978) ("Sentencing is within the discretion of the trial judge . . . where, as here, the sentence falls within the bounds prescribed by statute, it is not reviewable [and] will not be reviewed absent some extraordinary circumstance."). See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (sentencing judge may consider evidence from the defendant's prior record, pre-sentencing report, as well as from other sources); *Farrow v. United States*, 580 F.2d 1339, 1344 & n.2 (9th Cir. 1978) (en banc) (trial judge has wide discretion in sentencing); *In Re Garmon*, 572 F.2d 1373, 1375 (9th Cir. 1978) (prisoner, already serving a criminal sentence, and later sentenced for civil contempt, has former sentence tolled during period of civil contempt confinement).

either (1) a 'manifest necessity' for the discharge of the original proceedings, or (2) 'the ends of public justice' would be defeated," the judge may properly declare a mistrial.⁷⁸⁶

Judicial discretion in a motion to vacate a sentence under 28 U.S.C. section 2255⁷⁸⁷ in which a defendant claims a *Tucker* violation⁷⁸⁸ has been delineated clearly by the Ninth Circuit in *Farrow v. United States*.⁷⁸⁹ The Ninth Circuit now holds that the original sentencing judge should hear the motion⁷⁹⁰ and determine whether the sentence he gave the defendant would have been different had the judge known of the invalidity of the prior conviction. If this question is answered affirmatively, the judge must then hold an evidentiary hearing to deter-

786. *Arnold v. McCarthy*, 566 F.2d 1377, 1386 (9th Cir. 1978) (citations omitted) (declaration of mistrial held not an abuse of discretion because jurors could not reach a verdict). *See Wade v. Hunter*, 336 U.S. 684, 690 (1948) ("[A] trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failing to discontinue would defeat the ends of justice."); *United States v. Lorenzo*, 570 F.2d 294, 298 (9th Cir. 1978) (determination of manifest necessity is left to the sound discretion of the trial court).

The "particular circumstances" needed to declare a mistrial have been described as "unforeseeable circumstances that arise during a trial making its completion impossible." 336 U.S. at 689. An example of these unforeseeable circumstances is "the failure of the jury to agree on a verdict." *Id.* *See also Arnold v. McCarthy*, 566 F.2d at 1386 (manifest necessity sufficient to permit the declaration of a mistrial occurs when the jury cannot reach a verdict).

The pivotal issue in this area is often whether the jury is deadlocked. The *Arnold* court isolated several factors to be considered by the judge in making this determination:

(1) A timely objection by defendant, (2) the jury's collective opinion that it cannot agree, (3) the length of the deliberations of the jury, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any proper communications which the judge has had with the jury and (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict.

566 F. 2d at 1387. *See also United States v. See*, 505 F.2d 845, 851-52 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (most critical factor in determining whether the jury is hopelessly deadlocked is its statement to that effect; once receiving such a statement, the judge must independently determine whether further deliberations would overcome the deadlock by questioning the jurors).

787. 28 U.S.C. § 2255 (1976) states in pertinent part:

A prisoner in custody . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence . . . Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing

788. *See United States v. Tucker*, 404 U.S. 443, 447 (1972) (sentence not imposed in the informed discretion of the trial court may be reviewed). The Court in *Tucker* held that a sentence based on specific considerations of prior convictions obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), is improper. 404 U.S. at 447-48.

789. 580 F.2d 1339, 1348 (9th Cir. 1978) ("[W]e now carefully outline the procedure for district courts to follow in § 2255 motions claiming *Tucker* violations . . .").

790. *Id.* at 1348-51.

mine the actual validity of the prior conviction.⁷⁹¹

2. Conduct of the prosecutor

a. Pre-trial proceedings

The United States Attorney in every case must make an initial determination whether to prosecute. A government attorney has a duty⁷⁹² in every trial to see that justice is done and, to this end, may exercise a broad range of discretionary powers.⁷⁹³ A decision to prosecute will not be found to be an abuse of discretion unless others similarly situated generally have not been prosecuted for similar conduct and the

791. *Id.* at 1353. If the judge finds, however, that at the time of the sentencing he mistakenly believed the prior conviction to be valid and increased the petitioner's sentence because of it, an evidentiary hearing must be held to determine the validity of the prior conviction. *Id.* at 1354.

At this evidentiary hearing, three issues must be examined: (1) petitioner's indigency at the time of the prior trial; (2) petitioner's lack of representation at the prior trial; and (3) absence of an effective waiver of petitioner's right to counsel. *Id.* at 1353-54. These issues are determined based on the preponderance of the evidence. *Id.* at 1355.

792. *Berger v. United States*, 295 U.S. 78 (1935), contains the seminal statement on the duty of a United States Attorney:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88. See *United States v. Powell*, 587 F.2d 443, 447 (9th Cir. 1978) (prosecutor's failure to reveal the whereabouts of witness to defense "smack[ed] too much of a trial by ambush" and was a violation of prosecutor's duty) (quoting *United States v. Kelly*, 420 F.2d 26, 29 (2d Cir. 1969)). See also *Blevins v. Ford*, 572 F.2d 1336, 1339 (9th Cir. 1978) (prosecutor enjoys immunity from civil rights action resulting from alleged misconduct at trial).

Although defense counsel is not under the same high duty as the prosecutor, he must still meet a minimum standard of conduct.

Defense counsel, of course, must represent clients with zeal, but an attorney impedes the administration of justice when he seeks to harass the judiciary by repeatedly pressing an obviously meritless argument solely for the purpose of trying to embarrass the trial court or to display his personal pique at one of its rulings.

United States v. Edwards, 587 F.2d 29, 31 (9th Cir. 1978) (application for defense counsel's investigator's fee denied).

793. See, e.g., *United States v. Clinton*, 574 F.2d 464, 465 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 830 (1978) (action for failure to file tax return may be filed either at defendant's place of residence or at the collection point where return should have been filed); *Hooker v. Klein*, 573 F.2d 1360, 1365 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978) (if government in good faith determines that extradition is warranted, prosecutor may pursue multiple extradition requests irrespective of earlier lack of success at same); *United States v. McCoy*, No. 78-1015, slip op. at 3906 (9th Cir. Nov. 27, 1978) (government was not under affirmative obligation to prevent destruction of evidence in possession of third party).

prosecutorial decision was based on an impermissible ground,⁷⁹⁴ or if such prosecution was a vindictive act toward the defendant.⁷⁹⁵

All federal criminal prosecutions must proceed by way of a grand jury indictment.⁷⁹⁶ When presenting evidence to the grand jury, the prosecutor need not present all evidence favorable to the defendant,⁷⁹⁷ nor need he advise the grand jury of all matters bearing on the credibility of potential witnesses.⁷⁹⁸ Although the prosecutor may present evidence inadmissible under the Federal Rules of Evidence,⁷⁹⁹ deceptive

794. *United States v. Gillings*, 568 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978), sets out the *prima facie* case for selective prosecution: "defendant must show: (1) that others are generally not prosecuted for the same conduct; and (2) that the decision to prosecute this defendant was based on such impermissible grounds as race, religion, or the exercise of constitutional rights." *Id. Accord*, *United States v. Douglass*, 579 F.2d 545, 550 (9th Cir. 1978) (no evidence introduced to show improper criteria as basis for prosecution for re-entering military reservation without permission); *United States v. Arias*, 575 F.2d 253, 255 (9th Cir.), *cert. denied*, 439 U.S. 868 (1978) (defendant did not show that the treatment accorded him differed from those similarly situated or that the prosecution was based on an "invidious" criterion; perjury prosecutions do not unfairly single out those who take the witness stand in their own defense). *See also* *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976) (adopting Second Circuit *prima facie* case for selective prosecution) (citing *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)).

795. *See* *United States v. Arias*, 575 F.2d 253, 255 (9th Cir.), *cert. denied*, 439 U.S. 868 (1978) (defendant has the burden of proof to show vindictiveness in the sense of bad faith or maliciousness, and a bare allegation is insufficient to do so). *See also* *Blackledge v. Perry*, 417 U.S. 26, 28 (1974) (prosecution of a more serious charge after defendant's successful attack on his previous conviction held improper if determined to be vindictive). *Cf.* *United States v. Thurnhuber*, 572 F.2d 1307, 1310 (9th Cir. 1977) (addition of two counts prior to second trial after court's *sua sponte* declaration of mistrial held not vindictive) ("Without that close temporal—or otherwise apparent—link between the exercise of the right and the 'penalty,' there can be no 'realistic likelihood of 'vindictiveness'.") (citations omitted); *United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978) (manifest appearance of vindictiveness, as well as vindictiveness in fact, is sufficient to invoke the *Blackledge* rule).

796. U.S. CONST. amend. V states in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury"

797. *See* *United States v. Romero*, 585 F.2d 391, 399 (9th Cir. 1978) ("Contrary to the obligation imposed upon the prosecution at trial, the Government is not required to present all evidence that might be exculpatory to a grand jury."); *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978) (affidavit relating to a potential witness' credibility need not be presented to the grand jury by the prosecutor) ("Dismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way, as where perjured testimony has knowingly been presented").

798. *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978).

799. *See, e.g.,* *United States v. Romero*, 585 F.2d 391, 399 (9th Cir. 1978) ("[I]t is well established that a grand jury may return an indictment based solely upon hearsay evidence."). *See generally* *Costello v. United States*, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.").

evidence, such as perjured testimony,⁸⁰⁰ may not be presented to the grand jury.

In 1978, both the Supreme Court and the Ninth Circuit closely examined plea bargain agreements. Following the Court's decision in *Bordenkircher v. Hayes*,⁸⁰¹ the Ninth Circuit, in *United States v. Allsup*,⁸⁰² approved the practice whereby the prosecutor initially does not file all possible charges against the accused but does so later if the defendant does not accept the plea bargain agreement. Although the Ninth Circuit found this practice not violative of the due process clause of the fourteenth amendment, as the defendant is free to accept or to reject the prosecution's offer,⁸⁰³ due process does require that a motion to withdraw a guilty plea be granted if the plea was not knowingly and intelligently entered into or if the state failed to keep its part of the bargain.⁸⁰⁴

800. *See United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978) ("[O]nly in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment . . ."). *See also United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978) (dicta) ("Dismissal of an indictment is required . . . where perjured testimony has knowingly been presented.").

801. 434 U.S. 357, 360-61 (1978) (additional charge of being repeat offender properly used as bargaining tool by prosecutor).

802. 573 F.2d 1141, 1143 (9th Cir. 1978). *See United States v. Gerard*, 491 F.2d 1300, 1305-06 (9th Cir. 1974) (since during the plea bargaining process "a prosecutor may properly indicate the risks in not pleading guilty, whether of a larger sentence or of a larger exposure . . . we see no reason why the state should necessarily be precluded in all respects from actualizing these risks when the plea is withdrawn.").

803. *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) ("[T]he course of conduct engaged in by the prosecutor . . . which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.").

804. *Stone v. Cardwell*, 575 F.2d 724, 726 (9th Cir. 1978). *See Santobello v. New York*, 404 U.S. 257, 261 (1971) ("The [guilty] plea must . . . be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known When a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled.").

Promises made by individual government attorneys are binding on all attorneys within the prosecutor's office. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (failure of prosecuting assistant U.S. Attorney to disclose that prosecutor's key witness was offered a plea bargain by another assistant U.S. Attorney violated defendant's due process rights). The Court observed:

The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Id.; *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("The staff lawyers in a prosecutor's

As part of their obligation to ensure justice, United States Attorneys are under varying duties to reveal information to the defense.⁸⁰⁵ In *United States v. Agurs*⁸⁰⁶ the Supreme Court distinguished cases in which the prosecutor's obligation is to provide defense counsel with specifically requested exculpatory information from cases in which only a general request is made. In the former circumstance the test of materiality is whether the requested information might affect the outcome of the trial;⁸⁰⁷ in the latter, the requested evidence must "create . . . a reasonable doubt [as to guilt] that would not otherwise exist."⁸⁰⁸ In *United States v. Goldberg*,⁸⁰⁹ the Ninth Circuit applied the harmless error standard to a case in which information was specifically requested.⁸¹⁰ Reasoning that the notes at issue related to witness credibility, rather than to the substantive issue of guilt or innocence, the *Goldberg* court concluded that there was no reasonable probability that use of the notes at trial would have had a material effect on the verdict. The Government's failure to produce the notes, therefore, was harmless beyond a reasonable doubt.⁸¹¹

The use of false testimony may also require a new trial.⁸¹² The

office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of the agreement was inadvertent does not lessen its impact.").

805. See *United States v. Butler*, 567 F.2d 885, 888 (9th Cir. 1978) (per curiam) (prosecutor's nondisclosure of the "true nature of dealings" with its witness required a new trial; the government must disclose pertinent material evidence favorable to the defense, whether it relates to matters of substance or credibility). See also *United States v. Agurs*, 427 U.S. 97, 107-08 (1976) (prosecutor not volunteering exculpatory evidence was not denial of due process; prosecutor has constitutional duty to volunteer exculpatory information to the defense if not doing so would result in denial of defendant's right to fair trial); *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963) (suppression by prosecution of evidence favorable to accused upon request violates due process when evidence is material to guilt or to punishment, irrespective of good or bad faith of prosecution).

806. 427 U.S. 97 (1976).

807. *Id.* at 104.

808. *Id.* at 112.

809. 582 F.2d 483, 490 (9th Cir. 1978).

810. *Id.* at 488-90. The *Goldberg* court analogized the standard of review for the denial of a request for specific exculpatory materials to the standard of harmless error: "whether the requested evidence might affect the outcome of the trial." This standard appears to be synonymous with "a reasonable possibility that the error affected the verdict." *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Reasoning that the general request standard of *Agurs* is too difficult to apply, the Ninth Circuit will avoid its application whenever possible. While in *Goldberg* it was doubtful that the defendant's request for "any statements" and "any documents" described "specific evidence" as contemplated by the Court in *Agurs*, the Ninth Circuit accepted *arguendo* defendant's claim that the requests were sufficiently specific. 582 F.2d at 488-90.

811. *Id.* at 490.

812. *United States v. Agurs*, 427 U.S. 97, 103 (1976) ("[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is

Ninth Circuit in *United States v. Butler*⁸¹³ defined its standards for evaluating intentional and negligent nondisclosure by the prosecution of the use of false testimony. Finding the standards developed by the Supreme Court in *Giglio v. United States*⁸¹⁴ too restrictive,⁸¹⁵ the Ninth Circuit formulated a test for negligent nondisclosure that requires a new trial whenever the nondisclosure "might reasonably have affected the jury's judgment on some material point without necessarily requiring a supplemental finding that it also would have changed its verdict."⁸¹⁶ Since a finding of negligent nondisclosure is more probable than a finding of intentional nondisclosure,⁸¹⁷ the prudent prosecutor should err on the side of a more complete disclosure.

b. During the trial

The prosecutor may comment on the evidence in both his opening⁸¹⁸ statement and closing⁸¹⁹ argument as well as dismiss counts of the in-

any reasonable likelihood that the false testimony could have affected the judgment of the jury."); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (if prosecutor allows into evidence information he knows is false, defendant's right to fair trial has been violated). *But see* *United States v. Phillips*, 575 F.2d 1265, 1267 n.1 (9th Cir. 1978) (prosecutor's nondisclosure of false testimony by prosecution witness not misconduct as defendant fully exposed the falsity on cross-examination); *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978) (in trial for possession with intent to distribute, absence of evidence that testimony in question was false prevented finding of prosecutorial misconduct).

813. 567 F.2d 885, 889 (9th Cir. 1978) (per curiam) (prosecution's concealing the "true extent of dealings" with its own witness held to be misconduct).

814. 405 U.S. 150, 154 (1972) ("A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury'." (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959))).

815. 567 F.2d at 890 ("The thrust of *Brady* and *Giglio*, as well as of the proposed amendments to the Federal Rules of Criminal Procedure . . . seems to be in the direction of requiring more complete disclosure of evidence essential for, or at least useful to, full presentation of the defense.").

816. The *Butler* court observed that "*Giglio's* 'effect on the judgment of the jury' language seems to focus on the quality of the evidence rather than on the outcome of the case." *Id.*

817. *Id.* at 891. *Butler*, however, does not change the standard for review of admitted or "virtually non-controverted" nondisclosures by the prosecutor. These result in the per se granting of a motion for a new trial. *Id.*

818. *See, e.g., United States v. Lopez*, 575 F.2d 681, 684 (9th Cir. 1978) (prosecutor's reference to inadmissible hearsay in opening statement in homicide prosecution did not require granting of mistrial motion as statement did not have material effect on jury). *But see id.* at 687-88 (inadmissible hearsay in opening statement is damaging error which, when coupled with individually harmless errors, warrants mistrial) (Hufstedler, J., dissenting). *See generally United States v. Rich*, 580 F.2d 929, 936 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) ("[I]mproprieties in counsels' arguments to the jury do not require a new trial unless they are so gross as probably to prejudice the defendant and the prejudice has not been neutralized by the trial judge.").

819. *See, e.g., United States v. Mikka*, 586 F.2d 152, 155-56 (9th Cir. 1978) (prosecutor's

dictment following the presentation of all the evidence.⁸²⁰ He may not, however, limit the defendant's access to witnesses by his remarks to those witnesses.⁸²¹

A closely scrutinized area of prosecutorial conduct embraces comments on the defendant's assertion of his constitutional rights. In *United States v. Lopez*,⁸²² for example, such a comment⁸²³ was allowed

assertions of personal beliefs in closing argument were "not so gross as probably to prejudice the defendant" even though the prosecutor exceeded the bounds of propriety and ignored the judge's warnings; *United States v. Rich*, 580 F.2d 929, 936 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (prosecutor's expression of obvious opinion on witness' credibility held not error when disclaimed as not evidence); *United States v. Sturgis*, 578 F.2d 1296, 1299-1300 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978) (prosecutor's remark in closing argument that "birds of a feather flock together" strongly condemned, but held harmless in light of record replete with evidence of defendant's involvement in the alleged crime); *United States v. Lopez*, 575 F.2d 681, 685-86 (9th Cir. 1978) (under unusual circumstances of case, reference to post-*Miranda* silence in closing statement constituted harmless error not warranting reversal); *United States v. Sigal*, 572 F.2d 1320, 1322 (9th Cir. 1978) (prosecutor's comment "[b]ut the point is, ladies and gentlemen, that he . . . unlike the defendants Baker and Sigal came forward before the trial and admitted his guilt" held to be part of the prosecutor's effort to bolster the credibility of a key witness and in context was "not of such character that the jury would naturally and necessarily take them to be comments on the failure of the accused to testify.") (citing *United States v. Cornfeld*, 563 F.2d 967, 971 (9th Cir. 1970)); *United States v. Lyman*, 592 F.2d 496, 499 (9th Cir. 1978) (although prosecutor's remark was conceded to have been improper, as it was more probable than not that the remark did not materially alter the verdict, it was not held as error).

820. *See, e.g.*, *United States v. Price*, 577 F.2d 1356, 1366-67 (9th Cir. 1978) (dismissing two counts of four-count indictment at end of closing arguments held not to violate prosecutor's duty of candor).

821. *See, e.g.*, *United States v. Rich*, 580 F.2d 929, 934 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (FBI agent's advice to witnesses that they need not confer with defense counsel held not to have improperly influenced the witnesses since they were told they had opportunity to so confer) ("[W]e recognize that the abuses can easily result when officials elect to inform potential witnesses of their right not to speak with defense counsel [I]t is imperative that prosecutors and other officials maintain a posture of strict neutrality when advising witnesses of their duties and rights.").

822. 575 F.2d 681 (9th Cir. 1978).

823. The prosecutor's comment was:

The remark made by the defendant, apparently to his mother when she said why did you do it and he said: I didn't mean to, he started it, or something along those lines. If anything, perhaps this shows this was the beginning of some remorse. He killed his brother by pointing the gun at him when all the brother had done was start to walk at him. And then the gravity of this begins to sink in, although he didn't seem to be too remorseful the next day when Agent Freking was driving here to Tucson when he was laughing at jokes or whatever. So in any event, this is a likely or possible explanation for this. And in view of the fact he never told any of the other agents that it was an accident or that William was the cause of this, I submit to you it is pretty suspicious or it is unlikely this is the real explanation here. If it really was an accident, why didn't he protest his innocence, why didn't he protest and say: Wait a minute, this was an accident. Why didn't he stay home and say I had no reason to turn myself in. Those were his words to Ken Freking. He realized he had to go turn himself in. Would he have felt the same way if it was just an accident? I say no.

Id. at 684.

as long as it was not "extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported the acquittal."⁸²⁴ Indirect remarks also are carefully examined, but are permissible as long as the jury would not naturally and necessarily construe the comment as one reflecting on defendant's failure to testify.⁸²⁵

c. *Relief for abuse of discretion*

Improper prosecutorial remarks usually can be remedied by a curative instruction given by the court.⁸²⁶ Absent timely objection at trial, however, the Ninth Circuit normally will not consider the conduct unless it constitutes plain error.⁸²⁷ Comments adverse to the constitutionally protected rights of the accused are not necessarily plain error; even if found to be plain error, however, such conduct may be harmless error not warranting reversal.⁸²⁸

3. Conduct of the jury

The unique value of the jury "lies in the interposition between the accused and his accuser of the commonsense judgment of a group of

824. *Id.* at 685.

825. *See, e.g.,* United States v. Sigal, 572 F.2d 1320, 1323 (9th Cir. 1978) (prosecutor's inadvertent and unintended comment on post-*Miranda* silence was plain error on face, but held to be harmless).

826. *See* United States v. Rich, 580 F.2d 929, 936 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) ("[I]mproprieties in counsel's arguments to the jury do not require a new trial unless they are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge.") (citing United States v. Parker, 549 F.2d 1217, 1222 (9th Cir.), *cert. denied*, 430 U.S. 971 (1977)).

827. *See, e.g.,* United States v. Rich, 580 F.2d 929, 936 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (plain error is the standard of review as defendant did not make a timely objection to prosecutor's remark); United States v. Lopez, 575 F.2d 681, 684-85 (9th Cir. 1978) (no objection made to comment and no curative instruction requested; therefore, first inquiry on appeal is whether conduct in question amounts to plain error).

The Ninth Circuit has held that an objection or motion for mistrial during closing arguments need not be made until after the completion of the argument. United States v. Lyman, 592 F.2d 496, 499 (9th Cir. 1978) (motion for mistrial at end of prosecutor's closing argument held timely). A contrary rule prevails or is favored in the First, Second, Fourth and Fifth Circuits. *See id.* at n.2 and cases cited therein.

828. *See, e.g.,* United States v. Lopez, 575 F.2d 681, 685 (9th Cir. 1978). The *Lopez* court made this distinction:

It is crucial to keep in mind, however, that the standard of "plain error" only goes to the issue of *reviewability* and *not* to the issue of whether a reversal is warranted. . . . Thus, an error unobjected to at trial may be so plain as to be reviewable under Rule 52(b), yet the error may be harmless and therefore not justify a reversal.

Id. (emphasis in original).

laymen.”⁸²⁹ This is jeopardized whenever an individual juror is exposed to information about the trial from sources outside of the courtroom.⁸³⁰ Such information would compromise the jury’s exclusive function: to weigh the credibility of witnesses, to resolve evidentiary conflicts and to draw reasonable inferences from proven facts.⁸³¹ Protection of the jury’s “free and unfettered” discretion in these areas is left to the trial court.⁸³²

Once the jury has returned a verdict, it may not thereafter impeach

829. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (jury of less than 12 held constitutional). See also *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (petit jury must be selected from representative cross section of community). The *Taylor* court characterized the value and the purpose of a jury as being “to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.” *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (sixth amendment right to trial by jury applied to states via the fourteenth amendment)).

830. See, e.g., *United States v. Weiner*, 578 F.2d 757, 765 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 981 (1978) (juror-initiated conversation with bailiff held not prejudicial; judge, therefore, did not abuse discretion in denying motion for new trial); *United States v. Avila-Macias*, 577 F.2d 1384, 1387-88 (9th Cir. 1978) (judge did not abuse discretion by failing to disqualify juror who passed outside of bar wherein alleged drug buy took place); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977), *cert. denied*, 434 U.S. 818 (1978) (juror’s statement prior to empaneling about predisposition to convict criminal defendants did not sufficiently establish bias to require her exclusion from panel) (“If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel.”).

831. *United States v. Brady*, 579 F.2d 1121, 1127 (9th Cir. 1978) (evidence in manslaughter trial was sufficient to allow jury finding of specific intent); *United States v. Young*, 573 F.2d 1137, 1139 (9th Cir. 1978) (evidence in conspiracy case was sufficient to allow jury finding of conspiracy even though all evidence was circumstantial).

832. The judge has considerable discretion to deal with jury misconduct. See *United States v. Avila-Macias*, 577 F.2d 1384, 1387 (9th Cir. 1978) (“The trial judge acted within appropriate limits of his discretion in appraising the probability of prejudice and the nature of any initiative he felt impelled to take in the matter.”); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977), *cert. denied*, 434 U.S. 818 (1978). The *Hendrix* court observed:

An important part of the district judge’s broad discretion centers on his response to allegations of juror bias or misconduct. For example, it is within the trial court’s discretion to determine whether and when to hold an evidentiary hearing on such allegations. If the judge orders an investigative hearing, it is within his discretion to determine its extent and nature.

The judge also has considerable discretion in dealing with jury bias stemming from trial publicity and from improper arguments by counsel. See *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (judge can protect juror from harassment by media after the trial is completed if reasonably necessary).

Should bias affect the jury beyond the reach of these above remedies, declaration of a mistrial may be necessary. See *United States v. Love*, 535 F.2d 152, 155 (9th Cir.), *cert. denied*, 429 U.S. 847 (1976) (mistrial not required because conversation between juror and defendant was entirely innocent).

that verdict.⁸³³ In *United States v. Weiner*,⁸³⁴ thirty minutes after a verdict had been returned and the jury polled and discharged, one juror informed the judge that she had not voted guilty. Rather, she maintained, her vote had been guilty "with reservation."⁸³⁵ The *Weiner* court denied the defendant's motion for a new trial, reasoning that a legally sufficient verdict⁸³⁶ had been returned and, as such, could not be impeached. Any juror uncertainty or misunderstanding regarding the verdict must be expressed at the time of the poll, not after the jurors have been excused and possibly subjected to "out-of-court cultivation."⁸³⁷ Furthermore, any such uncertainty must be reflected in the record.⁸³⁸

D. Evidence

1. Relevancy

All evidence must satisfy the threshold requirement of relevancy before it can be admitted.⁸³⁹ The Ninth Circuit, in 1978, was confronted with such a relevancy issue in a major securities fraud case involving the now-defunct Equity Funding Corporation. The defend-

833. See *United States v. Weiner*, 578 F.2d 757, 764 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 981 (1978) (expression of reservation in out-of-court statement about verdict in securities fraud case held to be insufficient grounds on which to challenge the verdict). The philosophy behind not allowing a jury to impeach its verdict was set forth in *McDonald v. Pless*, 238 U.S. 264, 267 (1915), where the Court observed:

When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room. 238 U.S. at 267.

834. 578 F.2d 757 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 981 (1978).

835. *Id.* at 764.

836. *Cf.* *Fox v. United States*, 417 F.2d 84, 88-89 (5th Cir. 1969) (a legally sufficient verdict was not returned when one juror did not respond when polled on verdict and other jurors thought that a majority was sufficient to find defendant guilty).

837. *United States v. Weiner*, 578 F.2d 757, 764 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 981 (1978). The *Weiner* court clarified the Ninth Circuit's statement in *United States v. Lustig*, 555 F.2d 737, 746 (9th Cir.), *cert. denied*, 434 U.S. 1045 (1977), that defendant "would have a valid objection if one or more jury members expressed some uncertainty as to the verdict." This language, reasoned the *Weiner* court, referred to expressions of uncertainty occurring at the time of polling, not after. 578 F.2d at 764 n.2.

838. *United States v. Lustig*, 555 F.2d 737, 746 (9th Cir.), *cert. denied*, 434 U.S. 1045 (1977) (record must reflect the uncertainty about or disagreement with the verdict expressed by the juror in order to be a basis on which to challenge the verdict) ("Where no dissent or uncertainty is demonstrated in court, testimony will not be received from juror or others regarding the verdict itself.").

839. FED. R. EVID. 402 states, in part: "Evidence which is not relevant is not admissible." See, e.g., *United States v. King*, 587 F.2d 956, 962 (9th Cir. 1978) (recorded conversations held relevant to nature of conspiracy that may have ended at least three months before talks took place).

ants in *United States v. Weiner*⁸⁴⁰ appealed their convictions for securities fraud stemming from their employment as independent accountants for Equity Funding. The appellants challenged a jury instruction that had allowed the jury to measure the defendants' intent and good faith according to their compliance with generally accepted auditing standards (GAAS) and generally accepted accounting principles (GAAP).⁸⁴¹ Ruling for the first time on this issue, the Ninth Circuit approved the lower court's instruction that evidence regarding compliance with GAAS and GAAP is relevant to, but not conclusive of, the issues of knowledge and willfulness.⁸⁴² In so ruling, the *Weiner* court observed that the defendant's "consistent failure to apply GAAS and GAAP after they knew some kind of major fraud was afoot provided a basis from which the jury could reasonably infer defendants' knowing and willful participation in the fraud."⁸⁴³

Federal Rule of Evidence 402 recognizes that relevant evidence must be suppressed if obtained in violation of the United States Constitution.⁸⁴⁴ Although rule 402 makes no specific mention of evidence obtained in violation of state constitutions, the Ninth Circuit, prior to the adoption of rule 402, required that procedures used to obtain evidence comply with *both* federal and state standards.⁸⁴⁵ After the adoption of rule 402, however, the Ninth Circuit retreated from this position. In *United States v. Grajeda*,⁸⁴⁶ the Ninth Circuit viewed the Federal Rules of Evidence as a comprehensive and exclusive code governing admissibility standards in federal courts.⁸⁴⁷ Evidence in *Grajeda*, obtained in violation of California law, was therefore admissible in federal court because it did not fall within any exception specified in rule 402.⁸⁴⁸

840. 578 F.2d 757 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978).

841. GAAS and GAAP are basic standards established by the accounting profession governing accounting methods.

842. 578 F.2d at 786.

843. *Id.* at 785.

844. FED. R. EVID. 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." See *id.*, Adv. Comm. Notes.

845. See, e.g., *United States v. Solomon*, 528 F.2d 88, 90 (9th Cir. 1978).

846. 570 F.2d 872 (9th Cir. 1978).

847. *Id.* at 874.

848. *Id.* In *Grajeda*, appellant contended that both her arrest and subsequent search of her car by state police officers violated California law. The court indicated that, even if a determination of the propriety of the arrest and search was necessary, it would hold that no violation of California law had occurred. *Id.* n.2.

2. Legal relevancy

If relevant evidence is more prejudicial than probative, it can be excluded under Federal Rule of Evidence 403.⁸⁴⁹ In *United States v. Shields*,⁸⁵⁰ the defendant attended a pre-indictment conference with the Internal Revenue Service at which his accountant did not reveal any non-taxable sources of funds, even in response to direct questions from IRS investigators. However, at Shields' trial for income tax evasion, the accountant testified that he personally had observed a large "cash hoard" in Shields' possession. The prosecutor sought to impeach the accountant during cross-examination by questioning him about his failure to mention such a cash hoard at the IRS conference. Shields himself was not cross-examined about the pre-indictment conference. The prosecutor, however, referred broadly in closing argument to the failure of both Shields and his accountant to raise the cash hoard defense at the conference.⁸⁵¹

Shields argued on appeal that his privilege against self-incrimination had been violated by the cross-examination of the accountant. The

849. FED. R. EVID. 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Ninth Circuit in 1978 did not reverse any district court rulings in the face of a rule 403 objection. *See, e.g., United States v. Sangrey*, 586 F.2d 1312 (9th Cir. 1978) (evidence of prior rape allegedly committed by defendant on same night as charged rape admitted); *United States v. Brady*, 579 F.2d 1121, 1129 (9th Cir. 1978) (photographs of decedent's battered face admissible in murder trial when principal issue was cause of death and photos were not of such gruesome and horrifying nature as to inflame jury); *United States v. Oaxaca*, 569 F.2d 518, 527 (9th Cir.), *cert. denied*, 439 U.S. 926 (1978) (impeachment evidence of prior conviction identical to charged offense not per se more prejudicial than probative); *United States v. Curtis*, 568 F.2d 643, 645-46 (9th Cir. 1978) (previous statement made by defendant, accused of raping and murdering a woman, that he would beat a woman who refused his sexual advances, held admissible).

The Ninth Circuit in 1978 twice evaluated jury comparisons of an accused's clothes. *See United States v. Satterfield*, 572 F.2d 687, 689-90 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978) (judge carefully limited the number of times jury would see appellant wearing mask for purposes of comparison with bank photos and recognition ability of witnesses); *United States v. Oaxaca*, 569 F.2d 518, 524-25 (9th Cir.), *cert. denied*, 439 U.S. 926 (1978) (when FBI agent photographed in appellant's clothes so that jury could compare with black-and-white bank photos, fact that one item of clothing worn by agent only circumstantially connected with appellant not grounds for reversal).

850. 571 F.2d 1115 (9th Cir. 1978).

851. The prosecutor stated in closing argument: "The defense which is raised here, and the one that where the evidence is produced for the first time in court, never occurred outside of the court before, before we started on the Tuesday a week ago, the government was never offered these explanations which—" At this point defense counsel made a motion for mistrial that was denied. *Id.* at 1118.

Ninth Circuit refused to discuss this issue because Shields had not been questioned about his own silence at the conference.⁸⁵² Although the Ninth Circuit recognized that the accountant's testimony on cross-examination circumstantially suggested that Shields himself had been silent, the court held that rule 403, rather than the fifth amendment, is the standard for determining the admissibility of such circumstantial evidence. Because the accountant's testimony was more probative than prejudicial, the Ninth Circuit affirmed.⁸⁵³

3. Prosecutor's rule

Specific acts are never admissible to prove conduct.⁸⁵⁴ However, such evidence is admissible under the so-called "prosecutor's rule" for other purposes, such as proving motive, intent or knowledge.⁸⁵⁵ In narcotics cases, defendants often insist that evidence of acts involving drugs different from those involved in the charged offense be declared inadmissible. It is the *type* of activity that is important, however, not

852. *Id.*

853. *See id.* at 1118-19.

854. FED. R. EVID. 404(a) provides:

Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

855. FED. R. EVID. 404(b) provides in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

See United States v. Sangrey, 586 F.2d 1312, 1314 (9th Cir. 1978) (rape victim's testimony that she heard defendant say he was "going over to the other girl" admissible to show opportunity, plan and intent to rape other girl); United States v. Radlick, 581 F.2d 225, 229 (9th Cir. 1978) (evidence that defendant asked for drugs several days before beginning of the drug manufacturing conspiracy charged in indictment admissible to show knowledge); United States v. Espinoza, 578 F.2d 224, 227 (9th Cir.), *cert. denied*, 439 U.S. 849 (1978) (prior incident in which appellant was detained on suspicion of transporting illegal aliens admissible in trial for such transportation to show knowledge and intent); United States v. Graham, 575 F.2d 739, 740 (9th Cir. 1978) (evidence of prior conviction as illegal alien and use of alias admissible to prove identity); United States v. Young, 573 F.2d 1137, 1140 (9th Cir. 1978) (testimony regarding prior drug transactions admissible to show knowledge and intent); United States v. Sigal, 572 F.2d 1320, 1323 (9th Cir. 1978) (prior drug transactions admissible to show knowledge and intent).

the identity of the drugs involved.⁸⁵⁶ For example, the Ninth Circuit has held that evidence of defendant's prior purchase of large quantities of marijuana is admissible to show a predisposition to sell cocaine.⁸⁵⁷

Each item of proffered evidence allowed by the prosecutor's rule must be analyzed individually. In *United States v. Powell*,⁸⁵⁸ for example, the defendant denied that he was the source of large quantities of marijuana found in a co-defendant's garage. The Government sought to introduce evidence that Powell had been convicted of selling small quantities of marijuana to undercover agents in 1969 and evidence of a 1973 conviction arising from the discovery of huge amounts of marijuana in Powell's own garage and basement. The trial judge refused to admit the 1969 conviction on the grounds that it was too remote and did not tend to prove intent, common plan or motive. The trial court did, however, admit the 1973 conviction as probative of motive, accepting the Government's argument that defendant's past experience, in having drugs discovered in *his own* house, motivated him to hide the marijuana in *someone else's* house.⁸⁵⁹

On appeal, the Ninth Circuit upheld the trial court's ruling that neither conviction was probative of intent⁸⁶⁰ or common plan.⁸⁶¹ The court, however, reversed the trial court's ruling that Powell's 1973 con-

856. *United States v. Batts*, 573 F.2d 599, 603 (9th Cir.), *cert. denied*, 99 S. Ct. 178 (1978).

857. *United States v. Segovia*, 576 F.2d 251, 252 (9th Cir. 1978). *See also* *United States v. Uriarte*, 575 F.2d 215, 217 (9th Cir.), *cert. denied*, 439 U.S. 963 (1978) (arrest for possession of large amounts of heroin admissible at trial for conspiracy to import and possess marijuana for distribution).

858. 587 F.2d 443 (9th Cir. 1978).

859. *Id.* at 445.

860. The court observed:

The basic criterion is that the evidence of other crimes must be relevant to prove an issue in the case. The only factual issue in this case was identity of the source of the marihuana stored in [the co-defendant's] garage. Powell did not purport to controvert intent, knowledge, or motive of the person who supplied the marihuana. He sought only to show that the source was not he. When a defendant denies participation in the act or acts which constitute the crime, intent is not a material issue for the purpose of applying Rule 404(b).

Id. at 448.

861. The court reasoned:

The Government produced no evidence which tended to connect Powell's prior criminal conduct with the marihuana in [the co-defendant's] garage. The probative value of evidence of other crimes *where the issue is identity* depends upon the extent to which it raises an inference that the perpetrator of the prior offenses was the perpetrator of the offense in issue. . . . Thus, if the characteristics of both the prior offense and the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant, no inference *of identity* can arise. . . .

The 1973 marihuana offense resembled the offense charged only in that large quantities of marihuana were stored in a house, *but nothing sets that prior offense apart from any other marihuana trafficking that involves large quantities of marihuana.*

Id. (emphasis added).

viction was probative of motive. Rejecting the Government's reasoning, the court noted: "We are unable to follow the Government's peculiar inversion of logic, whereby dissimilarities in a succession of criminal acts becomes [sic] marks of identity of the perpetrator."⁸⁶²

4. Impeachment⁸⁶³

Federal Rule of Evidence 609 provides that prior felony convictions and convictions involving dishonesty are admissible for purposes of impeachment if they are less than ten years old and have not been set aside.⁸⁶⁴ In *United States v. Trejo-Zambrano*,⁸⁶⁵ the defendant's prior Federal Youth Corrections Act⁸⁶⁶ conviction had been set aside after a probationary period. His attorney, however, misread the clerk's docket sheet and failed to notice that the conviction had been set aside. At a

862. *Id.* at 449. Thus, similarities between crimes are relevant to show common plan, but dissimilarities are not relevant to show motive.

863. The treatment given to impeachment in federal court is set forth in FED. R. EVID. 607-610 and 613. *See generally* *United States v. Cassasa*, 588 F.2d 282, 284-85 (9th Cir. 1978) (composite pictures, made by assembling slides of various features, that witnesses selected as most resembling roobers, are not relevant to impeach witnesses unless witnesses adopt composites as accurate representations of defendant); *United States v. Powell*, 587 F.2d 443, 449 (9th Cir. 1978) (evidence that defendant had previously smoked marijuana not admissible to impeach unless defendant denied smoking).

864. FED. R. EVID. 609 provides:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b). . . Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction

Even though a conviction is within ten years of trial, it is within the trial court's discretion to hold that it is too remote to have probative value and is therefore inadmissible. *See United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978) (1969 offense too remote for 1977 trial). Unconvicted bad acts are not admissible unless probative of truthfulness. FED. R. EVID. 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

See United States v. Sangrey, 586 F.2d 1312, 1314, 1315 n.2 (9th Cir. 1978) (testimony regarding unconvicted rape of another woman immediately prior to charged rape admissible for impeachment purposes).

865. 582 F.2d 460 (9th Cir. 1978).

866. 18 U.S.C. §§ 5005-5026 (1976).

pre-trial hearing on the admissibility of the conviction, the prosecutor, correctly and in good faith, stated that his copy of the FBI "rap" sheet indicated the conviction was still in force. Defense counsel then stated he would ask the defendant about the conviction on direct examination, apparently to avoid the sting of disclosure of the conviction on cross-examination. After the defendant was convicted, his counsel again looked at the docket sheet and noticed his mistake.

Federal Rule of Criminal Procedure 16(a)(1)(B) requires the prosecutor to supply the defendant with any copy of his prior record in the prosecutor's possession.⁸⁶⁷ In *Trejo-Zambrano*, the Ninth Circuit held that production of the FBI rap sheet was sufficient to comply with rule 16(a)(1)(B), refusing to impose a duty on prosecutors to investigate beyond the rap sheet to determine whether prior convictions have been set aside.⁸⁶⁸ The court stated that too great a danger of manufactured error would be created if reversal was required whenever defense counsel misread the record.⁸⁶⁹

5. Authentication and identification

Federal Rule of Evidence 901(b) indicates various means of authentication and identification. Under rule 901(b)(1), for example, the testimony of witnesses with knowledge is sufficient.⁸⁷⁰ Rule 901(b)(3) allows the trier of fact to compare evidence with authenticated specimens.⁸⁷¹ Under rule 901(b)(5), voice identifications can be made by proper opinion testimony based upon hearing the voice under circum-

867. FED. R. CRIM. P. 16(a)(1)(B) provides:

Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

868. 582 F.2d at 465.

869. *Id.*

870. See *United States v. Ballesteros-Cordova*, 586 F.2d 1321 (9th Cir. 1978) (admissible in-court identification of defendant based on driver's license photograph and testimony of agents who had detained suspect and viewed license); *United States v. Weiner*, 578 F.2d 757, 772 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (identification of work papers in securities fraud case by witness who had used them or knew handwriting); *United States v. Dreitzler*, 577 F.2d 539, 553 n.24 (9th Cir. 1978) (lay opinion on handwriting, based upon familiarity not acquired for purposes of litigation, admissible under rule 901(b)(2), which is merely a specific case of rule 901(b)(1)).

871. See, e.g., *United States v. Rich*, 580 F.2d 929, 936 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (prosecutor's invitation that jury compare for itself the handwriting on two exhibits already before it not plain error); *United States v. Antill*, 579 F.2d 1135, 1136 (9th Cir. 1978) (if exemplar used only for comparison purposes, fact that defendant is compelled to write sentences containing information about personal history does not violate privilege against self-incrimination).

stances connecting it with the alleged speaker.⁸⁷²

In *United States v. King*⁸⁷³ the Ninth Circuit rejected a rigid set of requirements governing the admissibility of recorded conversations. Although a list of requirements had been developed by the Second Circuit and adopted by the Eighth Circuit,⁸⁷⁴ the *King* court opted for flexibility, leaving the determination of the trustworthiness of the recording to the trial judge's discretion. The court placed the burden on the proponent to produce clear and convincing evidence of the recording's authenticity.⁸⁷⁵

6. Scientific evidence and expert opinion

Scientific evidence cannot be admitted unless the principles on which it is based have gained general acceptance in the scientific community.⁸⁷⁶ In *United States v. Kilgus*,⁸⁷⁷ a prosecution witness claimed to be able to identify unique objects using the Forward Looking Infrared (FLIR) tracking system. The witness admitted that he was not a qualified operator of the system and was not familiar with its technical aspects. Although defense cross-examination was limited by the military secrecy surrounding the FLIR system, evidence was introduced by the defense that demonstrated that the system's performance differs in response to atmospheric changes. Experts presented uncontradicted testi-

872. The identifications, however, cannot be made under unconstitutionally suggestive circumstances. *United States v. Flickinger*, 573 F.2d 1349, 1358 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978).

873. 587 F.2d 956 (9th Cir. 1978).

874. *United States v. McMillan*, 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); *United States v. McKeever*, 169 F. Supp. 426, 430 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F.2d 669 (2d Cir. 1959). The *McKeever* court required that the following facts be shown before a sound recording may be admitted properly into evidence:

- (1) That the recording device was capable of taking the conversation now offered in evidence.
- (2) That the operator of the device was competent to operate the device.
- (3) That the recording is authentic and correct.
- (4) That changes, additions or deletions have not been made in the recording.
- (5) That the recording has been preserved in a manner that is shown to the court.
- (6) That the speakers are identified.
- (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

169 F. Supp. at 430.

875. 587 F.2d at 561. Application of this flexible approach is exemplified in *United States v. Thomas*, 586 F.2d 123, 133 (9th Cir. 1978); *United States v. Rinn*, 586 F.2d 113, 117-18 (9th Cir. 1978).

876. *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978). See *United States v. Radlick*, 581 F.2d 225 (9th Cir. 1978) (defendant's use of polygraph properly disallowed by trial court because of many variable factors affecting reliability of test).

877. 571 F.2d 508 (9th Cir. 1978).

mony that the FLIR can be used only for generic identifications and not specific ones. Unrebutted defense testimony further established that the FLIR is not a generally accepted scientific technique for the unique identification of remote objects.⁸⁷⁸ Under these circumstances, the Ninth Circuit held that the FLIR evidence was inadmissible. The court noted, however, that if a proper foundation were laid for the reliability of the FLIR system and the expertise of its operator, FLIR evidence of generic identifications could be admissible in future cases.⁸⁷⁹

In *United States v. Adams*,⁸⁸⁰ the Ninth Circuit, for the first time in a criminal case, considered whether testimony based on memory refreshed by hypnosis is admissible. Adopting the rule applicable in civil cases, the Ninth Circuit held that hypnosis affects only the credibility and not the admissibility of such evidence.⁸⁸¹ The court rejected defendant's contention that hypnotized witnesses are incompetent to testify as a matter of law.⁸⁸² To prevent dangerous abuse of hypnosis in criminal cases, however, the court required that complete stenographic records be made of hypnosis sessions⁸⁸³ and that the sessions should be conducted by certified hypnotists.⁸⁸⁴

Federal Rule of Evidence 702 provides that qualified experts may testify on scientific, technical, or other specialized matters if their opinions will assist the fact finder in understanding the evidence and arriving at a decision.⁸⁸⁵ In the absence of timely objections, however, allowing testimony of persons who are not qualified experts does not necessarily constitute plain error.⁸⁸⁶

878. *Id.* at 510.

879. *Id.* at 510 n.2.

880. 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).

881. *Id.* at 198-99.

882. *Id.* at 199.

883. *Id.* n.12.

884. *Id.* n.13. These foundation requirements were not satisfied in the hypnosis session under review in *Adams*. The court, however, based its affirmance of the trial court's ruling on the defendant's failure to make any lack-of-foundation objections. *Id.*

885. FED. R. EVID. 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." See *United States v. Robbins*, 579 F.2d 1151 (9th Cir. 1978) (testimony of qualified expert that gun was manufactured in a certain state admissible to show gun was transported in interstate commerce).

886. See *United States v. Oaxaca*, 569 F.2d 518, 526 (9th Cir.), *cert. denied*, 439 U.S. 926 (1978) (unobjected-to inconsistent and imprecise testimony of criminologist regarding hair identification not plain error).

7. Privilege

The marital privilege⁸⁸⁷ of a party to a lawsuit prevents that party's spouse from testifying against him. The Ninth Circuit, unlike other circuits,⁸⁸⁸ considers out-of-court statements by spouses to be within this marital privilege.⁸⁸⁹ In *United States v. Price*,⁸⁹⁰ however, the court adopted the rule that the privilege does not apply to vicarious admission made by a co-conspirator spouse.⁸⁹¹ While recognizing the marital privilege's value in preserving family peace,⁸⁹² the Ninth Circuit held that the relationship between husband and wife is not impaired when (1) no adverse testimony is given in court by a spouse, and (2) the out-of-court statements are made in furtherance of a conspiracy in which both spouses are involved.⁸⁹³

In *Beckler v. Superior Court*,⁸⁹⁴ the Ninth Circuit suggested possible constitutional facets of the attorney-client privilege.⁸⁹⁵ An attorney in *Beckler* refused to comply with a California subpoena ordering him to appear before the grand jury and to produce his client's accounting records. He was found in contempt and sentenced by the state court. Affirming the district court's denial of the attorney's petition for writ of habeas corpus, the Ninth Circuit held that (1) the client's own privilege against self-incrimination was not violated by a subpoena directed at

887. FED. R. EVID. 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

See, e.g., *United States v. Landof*, 591 F.2d 36, 38 (1978) (common law attorney-client privilege applied in bank embezzlement case); *Beckler v. Superior Court*, 568 F.2d 661, 662 (9th Cir. 1978) (state law applicable in action regarding attorney-client privilege; denial of petition for writ of habeas corpus proper).

888. See, e.g., *United States v. Mackiewicz*, 401 F.2d 219, 225 (2d Cir.), cert. denied, 393 U.S. 923 (1968).

889. *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978).

890. *Id.*

891. See notes 914-22 *infra* and accompanying text.

892. 577 F.2d at 1365.

893. *Id.*

894. 568 F.2d 661 (9th Cir. 1978).

895. See Seidelson, *The Attorney-Client Privilege and Client's Constitutional Rights*, 6 HOFSTRA L. REV. 693 (1978) [hereinafter cited as Seidelson]; Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977) [hereinafter cited as *Fixed Rules*].

his attorney, and (2) the applicability of the attorney-client privilege in this case was a matter of state law and not a matter of fifth amendment constitutional law.⁸⁹⁶

Although no sixth amendment claim was raised in *Beckler*, the Ninth Circuit observed:

We note that certain basic elements of the attorney-client privilege which involves private consultation by a criminal defendant with his attorney could be so vital to the effective assistance of counsel as to be protected by the Sixth Amendment as made applicable to state proceedings by the Fourteenth Amendment.⁸⁹⁷

The court recognized, however, that the Supreme Court has never identified this as a constitutional basis for the attorney-client privilege.⁸⁹⁸ Until tested in the courts, the constitutional contours of the attorney-client privilege will remain unclear.

8. Hearsay

When testimony is given in court, the trier of fact can evaluate the sincerity, perception, memory, and narrative ability of a witness. The conditions of testimony in court—oath, personal presence, and cross-examination—tend to encourage truth and expose falsehood.⁸⁹⁹ These are not, however, the only possible indicia of reliability. The exceptions to the hearsay rule are based in part on the recognition that many out-of-court statements may be more reliable than in-court testimony.⁹⁰⁰ Adherence to the hearsay rule in all cases would, moreover, force the factfinder to go without relevant and reliable evidence necessary for a just and correct decision on the merits.⁹⁰¹ The federal hearsay exceptions reflect this balance between the practical need for

896. 568 F.2d at 662. See also FED. R. EVID. 501.

897. 568 F.2d at 663 n.3. The Ninth Circuit in *Beckler* noted that the Supreme Court had formulated a test for the proper assertion of the attorney-client privilege by an attorney in *Fisher v. United States*, 425 U.S. 391 (1976). The Ninth Circuit stated:

[The *Fisher*] test involves an evaluation of whether the client would have a Fifth Amendment privilege were the documents still in his hands. Although the Court thus made reference to a Fifth Amendment Constitutional standard to determine the extent of the attorney-client privilege under the Federal evidentiary rules, this differs from stating that such an interpretation of the attorney-client privilege is Constitutionally compelled by the Fifth Amendment.

568 F.2d at 662 n.2. But see Seidelson, *supra* note 895, at 707-10; *Fixed Rules*, *supra* note 895, at 485-86, 486 n.96. Both Professor Seidelson and the student author contend that the fifth and sixth amendments together may form a constitutional basis for the attorney-client privilege.

898. 568 F.2d at 663.

899. FED. R. EVID. 801 Adv. Comm. Note; 4 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE, ¶ 800[01], at 800-10 (1978) [hereinafter cited as WEINSTEIN].

900. FED. R. EVID. 801 Adv. Comm. Note.

901. *Id.*

trustworthy evidence and the ideal of testimony given in court under the scrutiny of the trier of fact.

a. Testimony constituting hearsay

The federal definition of hearsay contains three elements:⁹⁰² first, the declarant must make the statement out of court;⁹⁰³ second, the proffered evidence must be a "statement"—a verbal assertion or nonverbal conduct intended as an assertion;⁹⁰⁴ finally, the statement must be offered to prove the truth of the matter asserted. If offered for another purpose, the statements are not hearsay.⁹⁰⁵

i. prior consistent and inconsistent statements

The Federal Rules exclude certain prior consistent and inconsistent statements from the definition of hearsay and allow their admission as substantive evidence.⁹⁰⁶ Because these statements are not admissible

902. FED. R. EVID. 801(c).

903. *United States v. Rich*, 580 F.2d 929, 937 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (in-court statement about witness' own personal knowledge not hearsay).

904. *United States v. Oaxaca*, 569 F.2d 518, 525 (9th Cir.), *cert. denied*, 439 U.S. 926 (1978) (comparison photos of bankrobber's clothing not assertive or testimonial in character, and, hence, not hearsay). See *United States v. Rich*, 580 F.2d 929, 937 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (absence of entry in records of regularly conducted activity "probably not hearsay" according to authors of Adv. Comm. Note to FED. R. EVID. 803(7) but treated specifically as exception to resolve doubts definitively in favor of admissibility; basis of this rationale is probably that absence of records is not assertive).

905. Many statements are relevant simply because they are made and not necessarily because the matter asserted is true. Such statements are frequently referred to as "verbal acts" or as part of the "res gestae," and they are not hearsay within the definition of FED. R. EVID. 801. See *United States v. Brady*, 579 F.2d 1121, 1130 (9th Cir. 1978) (offer of proof must be made before court can decide if statements were part of res gestae); *United States v. Phillips*, 577 F.2d 495, 501 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) (completed portions of statements already in evidence are part of res gestae only if relevant); *United States v. James*, 576 F.2d 223, 229 n.10 (9th Cir. 1978) (statement by FBI agent over radio that extortionist's telephone call had begun held *not* a verbal act).

If statements are offered for purposes other than to prove the truth of the matter asserted, they are not hearsay even if they do not fit within the definition of verbal acts. See *United States v. James*, 576 F.2d 223, 229 (FBI agent's statement admissible for non-hearsay purpose of proving that radio messages received by witness were those sent by agent).

Prior inconsistent and consistent statements, when offered solely for impeachment or rehabilitative purposes, are not hearsay. *United States v. Radlick*, 581 F.2d 225, 229 (9th Cir. 1978) (declarant's acceptance of witness' offer to procure drugs offered to prove motive, intent and knowledge); *United States v. Brady*, 579 F.2d 1121, 1129 (out-of-court statements offered for impeachment only); *United States v. Fried*, 576 F.2d 787, 793 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978) (out-of-court statements not offered for their truth).

906. FED. R. EVID. 801(d)(1) states:

A statement is not hearsay if—

(1) The declarant testifies at the trial or hearing and is subject to cross-examination

unless the declarant is available for cross-examination under oath and in the presence of the fact finder, there is less reason to treat them as hearsay. The ideal conditions of testimony in court, though not available at the time the statements are made, will have been met subsequently.⁹⁰⁷

ii. admissions generally

Admissions by a party opponent are not considered hearsay in federal court.⁹⁰⁸ Such statements are not admissible unless made voluntarily. In *United States v. Brown*,⁹⁰⁹ a defendant contested the use of an admission allegedly made while he was intoxicated. The trial court failed to find formally that the statement was voluntary. On appeal, the Ninth Circuit reversed, holding that the trial court must make an affirmative finding on the voluntariness issue.⁹¹⁰

The use of tacit admissions, or admissions by silence, is authorized by the Federal Rules of Evidence.⁹¹¹ In *United States v. Lorenzo*,⁹¹² for example, the defendant made a valid waiver of his *Miranda* rights. He then failed to respond to the questions of a Secret Service agent concerning the presence of large numbers of small bills in defendant's possession, which suggested that defendant had changed large counterfeit bills. The court held that defendant's silence was a tacit admission and not an assertion of his previously waived *Miranda* rights.⁹¹³

concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him. . . .

See United States v. Rinn, 586 F.2d 113, 119-20 (9th Cir. 1978) (statements regarding true source of drugs offered to rehabilitate); *United States v. Allen*, 579 F.2d 531, 532 (9th Cir. 1978) (prior consistent statement can be used by government to rehabilitate after government itself has introduced prior inconsistent statement); *United States v. Strand*, 574 F.2d 993, 996 n.4 (9th Cir. 1978) (because defendant had not yet testified, statements were not admissible as prior consistent statements under rule 801(d)(1)). *See also United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978) (failure to advise grand jury of prior inconsistent statement not such a flagrant concealment as to justify dismissal of the indictment).

907. *See* note 899 *supra* and accompanying text.

908. FED. R. EVID. 801(d)(2).

909. 575 F.2d 746 (9th Cir. 1978).

910. *Id.* at 748.

911. FED. R. EVID. 801(a)(2) provides that: "A 'statement' is . . . nonverbal conduct of a person, if it is intended by him as an assertion." FED. R. EVID. 801(d)(2)(B) provides that: "A statement is not hearsay if . . . [it] is offered against a party and is . . . a statement of which [a party] has manifested his adoption or belief in its truth"

912. 570 F.2d 294 (9th Cir. 1978).

913. *Id.* at 298. *Cf.* Adv. Comm. Note to rule 801(d)(2)(B) which provides: "In criminal cases, however, troublesome questions have been raised by decisions holding that failure to

iii. vicarious admissions by co-conspirators

Vicarious admissions of co-conspirators⁹¹⁴ are admissible even though a conspiracy has not been charged⁹¹⁵ and the co-conspirators are not co-defendants.⁹¹⁶ A substantial foundation, however, is required: the statements must be made "during the course and in furtherance of the conspiracy,"⁹¹⁷ and evidence of the conspiracy, independent of the statements themselves, must be introduced.⁹¹⁸ Although the conspiracy must be established by substantial evidence, only slight evidence of defendant's connection need be presented.⁹¹⁹

In *United States v. Rosales*,⁹²⁰ the Ninth Circuit established that a determination of the prima facie existence of a conspiracy is a conclusion of law rather than a finding of fact. By characterizing this determination as legal, rather than factual, the *Rosales* court was not bound to apply the "clearly erroneous" standard of review⁹²¹ and was able to act independently in reversing the trial court's finding that the Govern-

deny is an admission However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties."

914. FED. R. EVID. 801(d)(2)(E) provides that: "[a] statement is not hearsay if . . . [it] is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." For discussion of the effect of the marital privilege on the co-conspirator's admissions exception, see notes 887-93 *supra* and accompanying text.

915. *United States v. Weiner*, 578 F.2d 757, 768 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (securities fraud); *United States v. Avila-Macias*, 577 F.2d 1384, 1388 (9th Cir. 1978) (narcotics violations); *United States v. Fried*, 576 F.2d 787, 793 n.6 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978) (transporting stolen property in interstate commerce).

916. *United States v. Weiner*, 578 F.2d 757, 768 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (securities fraud).

917. FED. R. EVID. 801(d)(2)(E). For a discussion of when a conspiracy ends, see *Krulewitch v. United States*, 336 U.S. 440, 442-43 (1949).

918. *United States v. Weiner*, 578 F.2d 757, 768 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (securities fraud); *United States v. Rosales*, 584 F.2d 870, 872 (9th Cir. 1978) (evidence sufficient to establish prima facie case of conspiracy must be independent of proffered statements); *United States v. Avila-Macias*, 577 F.2d 1384, 1388 (9th Cir. 1978) (contacts with co-conspirators sufficient); *United States v. Fried*, 576 F.2d 787, 792 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978) (independent evidence of conspiracy to transport stolen debentures interstate required to allow admission of co-conspirator's statement).

919. *United States v. Rosales*, 584 F.2d 870 (9th Cir. 1978) (conspiracy to distribute cocaine); *United States v. Weiner*, 578 F.2d 757, 768-69 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (conspiracy concerning securities fraud).

920. 584 F.2d 870 (9th Cir. 1978).

921. *Id.* at 875-76. Judge Hug, arguing in dissent, contended that the majority view was contrary to precedent, and that the district court's ruling, whether characterized as a finding of fact or a conclusion of law, was not the type for which the appellate court should substitute its own judgment unless the trial court was clearly erroneous. *Id.* at 875-76, 875 n.1 (Hug, J., dissenting).

ment had not established a conspiracy.⁹²²

*b. Hearsay exceptions*⁹²³

i. exceptions applicable to writings

In *United States v. Arias*,⁹²⁴ an official trial transcript was offered in a perjury proceeding. The Ninth Circuit held that the reporter's standard recital in the transcript, that defendant was duly sworn, was admissible hearsay under the public records exception of rule 803(8).⁹²⁵ The court distinguished the situation presented in *Arias* from those in which transcripts are used to prove the truth of their contents.⁹²⁶

The defendant in *United States v. Orozco*⁹²⁷ objected to the district court's admission into evidence of computer cards on the basis of the business records exception.⁹²⁸ The cards were prepared by customs officials on the Mexican border, who had observed defendant's vehicle passing through the border and entered the license plate number into a computer. Although the Ninth Circuit held admission of the computer cards to be proper, the court relied on the public records exception rather than the business records exception.⁹²⁹

The *Orozco* court noted that the language of the public records exception excludes "in criminal cases matters observed by police officers and other law enforcement personnel."⁹³⁰ If read literally, this language would have excluded the proffered computer records. The court, however, held that the purpose of this language was to exclude observations of law enforcement personnel made during confrontations of

922. *Id.* at 875-76.

923. In addition to recognizing the two classes of exceptions set forth in FED. R. EVID. 803-804, the federal courts allow, under certain conditions, other exceptions having "equivalent circumstantial guarantees of trustworthiness." FED. R. EVID. 803(24), 804(b)(5). See *United States v. Hoyos*, 573 F.2d 1111, 1115-16 (9th Cir. 1978) (equivalency exception not allowed when declaration against interest exception also denied because no corroborating circumstances indicating trustworthiness).

In *United States v. James*, 576 F.2d 223 (9th Cir. 1978), an FBI agent's statement over the radio that an extortionist's phone call had begun was held admissible. The defendant's objections to the admission of this evidence were overruled on the ground that the evidence was *not* hearsay.

924. 575 F.2d 253 (9th Cir.), *cert. denied*, 439 U.S. 868 (1978) (transcript admissible business record, at least when no timely objection made).

925. *Id.* at 254-55; FED. R. EVID. 803(8).

926. 575 F.2d at 254 & n.1.

927. 590 F.2d 789 (9th Cir.), *cert. denied*, 439 U.S. 1049 (1979).

928. *Id.* at 793. See FED. R. EVID. 803(6).

929. 590 F.2d at 793-94, 794 n.2.

930. FED. R. EVID. 803(8)(B).

an adversary nature with suspected criminals.⁹³¹ Since the routine recording of license numbers was not an adversary confrontation, the literal language of the public records exception did not apply, and the computer cards were admissible.

In *United States v. Rich*,⁹³² the Ninth Circuit made further comparisons between the business records and public records exceptions. The exceptions involved in *Rich*, however, involved the exception pertaining to the *absence*, rather than the presence, of records of regularly conducted activities.⁹³³ An FBI agent testified, without further foundation, that a search of various police records, credit records, and city directories disclosed no trace of the person who appellant claimed had borrowed his car.⁹³⁴ Although the appellant objected that the statements constituted "negative hearsay," the district court admitted the evidence.

The absence of public records hearsay exception has an express foundation requirement.⁹³⁵ The public records exception itself has no such foundation requirement.⁹³⁶ In contrast, the business records exception requires that the custodian of records or other qualified witness lay the necessary foundation, whereas the absence of business records exception has no *express* foundation requirement.⁹³⁷

The Ninth Circuit in *Rich* assumed, without deciding, that such a foundation is a prerequisite to the admission of evidence of the absence of entries.⁹³⁸ The FBI agent's testimony about the absence of entries in both business and public records was therefore admitted without ade-

931. The Senate Committee Report to rule 803(8) explains:

Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

S. REP. NO. 93-1277, 93d Cong., 2d Sess. 11, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7064.

932. 580 F.2d 929 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978).

933. *Id.* at 937-38. *See* FED. R. EVID. 803(7) (absence of business records) and 803(10) (absence of public records).

934. 580 F.2d at 937.

935. FED. R. EVID. 803(10). This rule requires "evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record."

936. *See* FED. R. EVID. 803(8).

937. FED. R. EVID. 803(6), the business records exception, requires that the "custodian" of records "or other qualified witness" lay the necessary foundation. In contrast, rule 803(7), the absence of business records exception, does not expressly require the testimony of a custodian or other qualified witness.

938. 580 F.2d at 937-38. Such an assumption is logical in light of the language in rule 803(7) that such evidence is admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." FED. R. EVID. 803(7).

quate foundation. The *Rich* court, however, affirmed the district court's admission of the agent's testimony because of appellant's failure to make a lack-of-foundation objection. Appellant objected to the admission of the testimony only on the grounds of "negative hearsay."⁹³⁹ Furthermore, the court refused to invoke the plain error doctrine because appellant did not present evidence suggesting the unreliability of the records underlying the improperly-introduced evidence.⁹⁴⁰

ii. declarations against interest⁹⁴¹

The Ninth Circuit, in *United States v. Satterfield*,⁹⁴² discussed whether the trustworthiness of the witness, as well as that of the declarant, is a proper area of inquiry in evaluating the applicability of the declaration against interest exception.⁹⁴³ Appellant sought to introduce exculpatory statements of a co-defendant who refused to testify at trial. The Government offered evidence which, among other things, showed that the witnesses who claimed to have heard the statements were not present at the time the alleged statements were made.

939. 580 F.2d at 938-39. The "negative hearsay" objection itself was improper in light of FED. R. EVID. 803(7) and 803(10), which specifically allow such evidence under controlled circumstances.

940. 580 F.2d at 939. The court's reasoning seems to ignore the purpose of the proffered evidence. It was offered to prove that a person, who appellant claimed had borrowed his car, did not exist. Any set of records would seem inherently unreliable for such a purpose.

Since appellant had failed, however, to attack the evidence properly at three different stages—objection, cross-examination, and appeal—the court apparently decided, in light of the existence of other strong evidence, that it would not be unfair to apply the waiver rules in a highly technical manner.

941. FED. R. EVID. 804(b)(3) provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

.....

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

See also *United States v. Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978) (although exception not limited to direct confessions of criminal responsibility, the statements must, in a real and tangible way, subject declarant to criminal responsibility; statements consisting principally of material exculpating a co-defendant are suspect absent the presence of solidly inculpatory statements).

942. 572 F.2d 687 (9th Cir.), cert. denied, 439 U.S. 840 (1978).

943. *Id.* at 691-92. The circuits differ on this issue. Compare *United States v. Atkins*, 558 F.2d 133, 135 (3d Cir. 1977), cert. denied, 434 U.S. 1071 (1978) (trustworthiness of witness irrelevant) with *United States v. Bagley*, 537 F.2d 162, 167 (5th Cir. 1976), cert. denied, 425 U.S. 1075 (1977) (trustworthiness of witness relevant).

The *Satterfield* court discussed two arguments against considering witness trustworthiness.⁹⁴⁴ First, the court noted that the purpose of the hearsay rule is to test the reliability of statements made under conditions different from those under which testimony is given at trial.⁹⁴⁵ The credibility of witnesses testifying to out-of-court statements can be evaluated in court by the factfinder. Second, the court observed that the denial of access to such evidence might be an unconstitutional infringement of a defendant's fundamental right to call witnesses in his own defense.⁹⁴⁶

The Ninth Circuit, however, also recognized some factors suggesting that witness trustworthiness is a proper ground for inquiry.⁹⁴⁷ First, the court pointed out that the declaration against interest exception itself refers to the trustworthiness of the statement, not that of the declarant.⁹⁴⁸ Second, the court noted that the exception's legislative history suggests that the rule was intended to be more than purely a hearsay rule. The drafters were suspicious of fabrication of both the existence and the contents of the declarations. Evidence showing that the witnesses could not have heard the statements when they were made is therefore highly relevant to the issue of fabrication.⁹⁴⁹

The *Satterfield* court, however, found it unnecessary to decide whether witness trustworthiness should be considered because the trial judge based his decision solely on the trustworthiness of the declarant's statements rather than the trustworthiness of the witnesses.⁹⁵⁰

c. *Constitutional dimensions of hearsay problems*

The admission of hearsay statements arguably conflicts with a defendant's sixth amendment right to confront and cross-examine adverse witnesses. In *Dutton v. Evans*,⁹⁵¹ however, the Supreme Court held that such statements may be admissible if they are surrounded by sufficient

944. 572 F.2d at 691-92.

945. *Id.* at 691.

946. *Id.* at 692.

947. *Id.*

948. However, because the statements are against the defendant's penal interest, it appears that such declarants are untrustworthy. The trustworthiness requirement was added to keep declarants, who have escaped arrest or are outside the jurisdiction of the court, from giving gifts of exculpatory statements to their partners in crime. Language referring specifically to declarant reliability, therefore, would be anomalous.

949. 572 F.2d at 692.

950. *Id.* at 692-93. In a concurring opinion, however, Judge Sneed indicated that witness trustworthiness is a proper area for inquiry. *Id.* at 694 (Sneed, J., concurring).

951. 400 U.S. 74 (1970).

indicia of reliability.⁹⁵² In *United States v. Weiner*,⁹⁵³ the Ninth Circuit employed the *Dutton* analysis and admitted the vicarious admissions of a co-conspirator who had asserted his fifth amendment rights.⁹⁵⁴

Sustaining hearsay objections to statements proffered by a defendant, however, may violate the fundamental right of an accused to call witnesses on his own behalf when the circumstances involved are grossly unfair.⁹⁵⁵ Refusal to admit hearsay statements under a hearsay exception, because of doubts as to a witness' credibility, may raise such an issue.⁹⁵⁶

9. Scope of examination

The scope and extent of the examination of witnesses is within the discretion of the trial court. The exercise of such discretion will not be disturbed unless a defendant's constitutional right to confront and cross-examine witnesses is denied.⁹⁵⁷ Furthermore, improper limitation of examination is harmless error if the information sought is explored fully at other points during the trial.⁹⁵⁸

The defendant in *United States v. Lopez*,⁹⁵⁹ charged with second-degree murder, claimed self-defense. On cross-examination, defendant

952. The Court considered four factors to be important: (1) the statement included no express assertion of past fact; (2) the declarant had personal knowledge of the identity and role of participants in the crime; (3) the possibility was remote that the declarant was relying on faulty recollection; and (4) the circumstances under which the statement was made gave no reason to believe that the declarant had misrepresented the defendant's involvement in the crime. *Id.* at 88-89.

953. 578 F.2d 757 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978).

954. *Id.* at 771-72.

955. See *Chambers v. Mississippi*, 410 U.S. 284, 298-302 (1973) (testimony "critical" to defense and bearing assurances of trustworthiness excluded on basis of hearsay objection).

956. See *United States v. Satterfield*, 572 F.2d 687, 692 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978); *United States v. Basile*, 569 F.2d 1053, 1060-61 (9th Cir.), *cert. denied*, 436 U.S. 920 (1978) (Hufstедler, J., dissenting) (allowing use of exculpatory statements only for impeachment purposes rather than as substantive evidence under hearsay exception raised *Chambers* issue).

957. *United States v. Whitson*, 587 F.2d 948, 951 (9th Cir. 1978) (after defendant denied possessing a bomb, cross-examination regarding his knowledge of explosives was properly allowed); *United States v. Sturgis*, 578 F.2d 1296, 1300 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978) (not abuse of discretion for trial judge to allow prosecution to elicit from defense witness that those found guilty of crime with which defendant was charged are not incarcerated); *United States v. Weiner*, 578 F.2d 757, 766 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (defendants in securities fraud case allowed to cross-examine witness about extramarital relationships and fraud not charged in the indictment).

958. *United States v. Price*, 577 F.2d 1356, 1362 (9th Cir. 1978) (denial of cross-examination regarding relationship between witness and law enforcement officers harmless error when witness testified as to her dealings with law enforcement officers at later point in trial).

959. 575 F.2d 681 (9th Cir. 1978).

testified that he saw the decedent carrying a knife on the day of the murder. On redirect, defense counsel attempted to explore this testimony more fully; she was interrupted, however, by the trial judge who stated before the jury that he could not remember any references in defendant's testimony to a knife. The court reporter mistakenly agreed. The Ninth Circuit refused to reverse because, after the remarks of the judge and court reporter, defense counsel made no objection and did not ask the judge for permission to open a line of questioning regarding the knife as if on direct.⁹⁶⁰

10. Presumptions

In *United States v. King*,⁹⁶¹ defendant was charged with conspiracy to distribute cocaine. Defendant, a physician, raised the medical exception to the statute, which makes it a crime to distribute or dispense controlled substances.⁹⁶² The medical exception expressly places on the physician the burden of going forward with evidence of authorization to distribute or dispense such substances.

In certain situations, however, the burden of proof shifts to the government to prove beyond a reasonable doubt that the medical exception does not apply. As noted by the court in *King*, one such situation is that found in *United States v. Black*.⁹⁶³ In *Black*, the Government introduced evidence showing (1) that Black was a medical practitioner, (2) that Black was duly registered with the Attorney General to dispense controlled substances, and (3) that the transfers made by Black were to his own patients by prescription.⁹⁶⁴ Even though Black did not attempt to introduce any evidence on his behalf regarding the exception, and thus did not meet the burden expressly imposed on him by statute, the Ninth Circuit held that the express statutory presumption was rendered irrational and unconstitutional when the required evidence was introduced by the Government.⁹⁶⁵

In *King*, it was undisputed that the defendant was a doctor, and evidence of his controlled substances registration was improperly suppressed by the trial judge. However, unlike *Black*, no evidence that the

960. *Id.* at 686. Judge Hufstедler, in dissent, argued that the defendant was deprived of his primary defense and that any attempt by defense counsel to pursue the questioning after the comments of the court reporter and judge would have been counterproductive. *Id.* at 687 (Hufstедler, J., dissenting).

961. 587 F.2d 956 (9th Cir. 1978).

962. 21 U.S.C. §§ 822(b), 841(a)(1) (1976).

963. 512 F.2d 864 (9th Cir. 1975).

964. *Id.* at 870-71.

965. *Id.* at 871.

subject transfers were made to patients by prescription was introduced. In fact, circumstantial evidence suggested the contrary.⁹⁶⁶ Nevertheless, the Ninth Circuit held that the facts brought forth in *Black* did not reach the minimum threshold that defendant doctors had to meet before the burden of proof regarding the medical exception was shifted to the Government.⁹⁶⁷ The statutory presumption was still irrational once evidence was brought forth showing that defendant was a physician registered to dispense controlled substances, regardless of evidence showing the manner of transfer.⁹⁶⁸

E. Defenses

1. Insanity

The defense of insanity is intended to prevent the criminal conviction of a defendant who lacks responsibility for his acts.⁹⁶⁹ A defendant is presumed legally sane until he presents some evidence of his insanity.⁹⁷⁰ Only after the defendant comes forward with such evidence does the prosecutor bear the burden of demonstrating the defendant's sanity beyond a reasonable doubt.⁹⁷¹

The Ninth Circuit has adopted a portion of the American Law Institute (ALI) test for insanity.⁹⁷² In this circuit, a "person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the . . . [wrongfulness] of his conduct or to conform his conduct to the requirement of law."⁹⁷³

966. 587 F.2d at 964-65.

967. *Id.*

968. *Id.* Judge Choy argued in a separate opinion that proof that the subject transfers were made to patients by prescription was necessary to show that the presumption was irrational because, by statute, doctors are not allowed to dispense controlled substances without prescriptions unless confronted with an emergency. *Id.* at 967 (Choy, J., concurring and dissenting).

969. *United States v. Collins*, 433 F.2d 550, 556 (D.C. Cir. 1970).

970. *See, e.g., United States v. Schmidt*, 572 F.2d 206, 208 (9th Cir. 1978) (expert testimony that defendant was suffering from "schizophrenia of the chronically recurrent paranoid type" overcame presumption of sanity).

971. *See United States v. Winn*, 577 F.2d 86, 89 (9th Cir. 1978) (government did not have burden of proving defendant's sanity where defendant failed to give timely notice of intention to rely on insanity defense); *United States v. Ingman*, 426 F.2d 973, 976 (9th Cir. 1970) ("The nature and quantum of evidence of sanity which the Government must produce to sustain its burden and take the case to the jury will vary in different cases.") (quoting *Brown v. United States*, 351 F.2d 473, 474 (5th Cir. 1965)).

972. *Wade v. United States*, 426 F.2d 64, 71-74 (9th Cir. 1970) (en banc) (defendant's armed robbery conviction reversed).

973. *Id.* at 71 (bracket in original). This remains the standard instruction in the Ninth

The word "wrongfulness" was substituted for "criminality"⁹⁷⁴ and denotes moral, rather than criminal, wrongfulness.⁹⁷⁵ This insanity rule has been interpreted to mean that "a defendant lacks substantial capacity to appreciate the wrongfulness of his conduct if he knows his act to be criminal but commits it because of a delusion that it is morally justified."⁹⁷⁶

In *United States v. Collom*⁹⁷⁷ the Ninth Circuit affirmed the defendant's robbery conviction, rejecting his contention that, because evidence of delusory behavior was presented at his trial, the court should have supplemented the standard jury instructions on the insanity defense.⁹⁷⁸ The instructions that were given consisted of the Ninth Circuit's adaptation of the ALI test and an explanation of wrongfulness; they did not include the further instruction that a person lacks substantial capacity if he *knows* that his act is criminal but nevertheless acts under a delusion that it is morally justified. The Ninth Circuit found it unnecessary to supplement the instructions, explaining that "a delusion that [a criminal act] is morally justified" is subsumed in the instruction that attributes lack of substantial capacity to mental defect or disease.⁹⁷⁹

In *United States v. Winn*⁹⁸⁰ the Ninth Circuit affirmed the defendant's conviction for making a false statement in a passport application. Winn contended that he was entitled to a jury instruction on the de-

Circuit. See, e.g., *United States v. Collom*, No. 77-1040 (9th Cir. June 15, 1978) (defendant's robbery conviction affirmed where insanity instructions consisted solely of ALI test and explanation of wrongfulness). Cf. *Myers v. Rhay*, 577 F.2d 504, 510-11 (9th Cir.), cert. denied, 439 U.S. 986 (1978) (petitioner's habeas corpus contention, that the state court's use of the M'Naghten test to determine his sanity was unconstitutional, rejected, "[n]otwithstanding the fact that the law of this Circuit is the American Law Institute 'substantial capacity' test, the use of the M'Naghten test by the states has been upheld as constitutional.") (citations omitted).

974. *Wade v. United States*, 426 F.2d 64, 71-72 (9th Cir. 1970) (en banc).

975. *United States v. Collom*, No. 77-1040, slip op. at 1871 (9th Cir. June 15, 1978); *United States v. Sullivan*, 544 F.2d 1052, 1055 (9th Cir. 1976).

976. *United States v. McGraw*, 515 F.2d 758, 760 (9th Cir. 1975). See *United States v. Monroe*, 552 F.2d 860, 864 (9th Cir.), cert. denied, 431 U.S. 972 (1977) (jury reasonable in concluding that defendant's belief, that selling cocaine was morally justifiable, resulted not from any mental defect or disease, but rather from his belief that the drug was not dangerous).

977. No. 77-1040 (9th Cir. June 15, 1978).

978. *Id.*, slip op. at 1871.

979. *Id.*, slip op. at 1872 (brackets in original). See also *United States v. Sullivan*, 544 F.2d 1052, 1055 (9th Cir. 1976) ("The word [delusion] adds no additional element to those which must be established before an individual is entitled to any instruction on legal insanity; it is a word of clarification, not of limitation.") (footnote omitted).

980. 577 F.2d 86 (9th Cir. 1978).

fense of insanity despite his failure to comply with a procedural rule requiring notice of an intention to raise the defense.⁹⁸¹ Winn argued that his procedural noncompliance with the rule should not bar his substantive right to insanity instructions. The *Winn* court rejected this contention, reasoning that the rule is not merely "formalistic," rather, it is "designed to insure that both the defendant and the government have ample opportunity to investigate the fact of an issue critical to the determination of guilt or innocence."⁹⁸²

Winn also claimed that the trial court had erred in refusing to instruct the jury that evidence of his mental state, even if insufficient to establish insanity, was still relevant to decide whether he had the specific intent to commit the crime with which he was charged.⁹⁸³ The Ninth Circuit disagreed, stating that, although a defendant is entitled to an instruction on his theory of the case if it is supported by the law and evidence, the "evidence at trial concerned . . . [defendant's] irresponsibility and drinking—not mental disease or defect."⁹⁸⁴ Therefore, the failure to instruct was not reversible error.

The Ninth Circuit will not disturb a jury's finding of a defendant's sanity if the evidence, when viewed most favorably to the government, is sufficient to permit a rational conclusion that the defendant was sane beyond a reasonable doubt.⁹⁸⁵

2. Due process

In *United States v. Russell*,⁹⁸⁶ the Supreme Court held that the essence of the entrapment defense was the defendant's predisposition to commit the crime of which he is accused rather than the Government's conduct.⁹⁸⁷ The Court stated, however, that it "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar

981. Defendant had failed to comply with FED. R. CRIM. P. 12.2(a), which provides in pertinent part: "If a defendant intends to rely upon the defense of insanity . . . he shall [make known] such intention If there is a failure to comply . . . insanity may not be raised as a defense. The court may for cause shown allow late filing"

982. 577 F.2d at 89.

983. *Id.*

984. *Id.* at 90.

985. *United States v. Monroe*, 552 F.2d 860, 864 (9th Cir.), *cert. denied*, 431 U.S. 972 (1977) (jury rationally could have concluded that defendant's belief in moral justification of criminal act did not result from mental defect or disease); *United States v. Ortiz*, 488 F.2d 175, 178 (9th Cir. 1973) (Ninth Circuit rejected insanity defense in aircraft piracy case, concluding that sufficient evidence had existed to support jury finding of sanity).

986. 411 U.S. 423 (1973).

987. *Id.* at 433-36.

the government from invoking judicial processes to obtain a conviction.⁹⁸⁸

In *Hampton v. United States*,⁹⁸⁹ a plurality of the Court indicated that due process principles would not prevent a predisposed defendant's conviction.⁹⁹⁰ The Ninth Circuit, however, has seized upon the lack of majority concurrence to avoid foreclosing the possibility of a due process defense when the government's conduct is sufficiently offensive.⁹⁹¹ This defense exists not as an exception to entrapment law but, rather, as an independent protection afforded by the due process clause regardless of a defendant's predisposition.⁹⁹²

In *United States v. Prairie*,⁹⁹³ the Ninth Circuit affirmed the defendant's conviction for distribution of cocaine. The defendant had attempted to invoke the due process defense by contending that the Government's employment of a particular informant was unconstitutional. The defendant argued that the use of the informant, a prostitute, was intended improperly to seduce him emotionally and sexually and thereby to persuade him to deal in cocaine. The Ninth Circuit found this assertion meritless. The Government had neither paid nor asked the informant to persuade the defendant to deal in drugs; rather it had paid her living expenses in return for information given in past cases. The *Prairie* court held that this use of a paid informant, although it may have constituted a violation of state criminal prostitution laws, was not, without more, a violation of the defendant's due process

988. *Id.* at 431-32. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952) (conduct of government agents in extracting evidence from defendant's stomach by use of emetic solution held to violate due process).

989. 425 U.S. 484 (1976).

990. *Id.* at 495 (Powell & Blackmun, JJ., concurring). The concurring opinion interpreted the plurality as saying that "the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior." *Id.* at 492. Justice Rehnquist stated that the remedy for outrageous police conduct "lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Id.* at 490 (plurality opinion, Stevens, J., taking no part in decision).

991. See, e.g., *United States v. Prairie*, 572 F.2d 1316, 1319 n.2 (9th Cir. 1978) (defendant's conviction affirmed where entrapment not shown by evidence); *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1338-39 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (same).

992. *United States v. Lue*, 498 F.2d 531, 534 (9th Cir.), *cert. denied*, 419 U.S. 1031 (1974) (government's deception not violative of due process where government did not "implant" the criminal design in defendant's mind). See also *United States v. Price*, 577 F.2d 1356, 1367 (9th Cir. 1978). In *Price*, the Ninth Circuit held that, because the crime of conspiracy was complete before there was any government participation, both the entrapment and due process defenses were barred.

993. 572 F.2d 1316 (9th Cir. 1978).

rights.⁹⁹⁴

The defendant in *Prairie* also argued that the trial court erred in failing to submit his due process defense to the jury. The Ninth Circuit found no error, however, holding that the question of whether government conduct is so outrageous as to constitute a violation of due process is one of law for the court to decide.⁹⁹⁵

3. Competency to stand trial

A defendant's conviction, when he has been required to stand trial while legally incompetent, will be reversed as violative of due process.⁹⁹⁶ A defendant is competent to stand trial if he is able to understand the nature and object of the proceedings against him, consult with his attorney, and assist his attorney in the preparation of his defense.⁹⁹⁷ In *Drope v. Missouri*,⁹⁹⁸ the Supreme Court held that it is the responsibility of the trial judge to prevent the trial of a defendant who is not competent to stand trial. This responsibility continues throughout the trial.⁹⁹⁹ A hearing on the issue of the defendant's competency is required sua sponte whenever a comprehensive evaluation of all available evidence leads the trial judge to doubt the defendant's competency.¹⁰⁰⁰ The doubt sufficient to require a hearing may be raised by any relevant evidence.¹⁰⁰¹

994. *Id.* at 1319 n.4. *Cf.* *United States v. Gonzales-Benitez*, 537 F.2d 1051, 1055 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976) (no due process violation where government agents provided the contraband).

995. 572 F.2d at 1319 (following *United States v. Gonzales*, 539 F.2d 1238, 1240 n.1 (9th Cir. 1976)).

996. *See also Drope v. Missouri*, 420 U.S. 162, 172 (1975) ("[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."); *Pate v. Robinson*, 383 U.S. 375, 378 (1966) ("the conviction of an accused person while he is legally incompetent violates due process").

997. *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); *Dusky v. United States* 362 U.S. 402, 402 (1960) (*per curiam*).

998. 420 U.S. 162 (1975).

999. *Id.* at 181. "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change" in his competency. *Id.*

1000. *United States v. Ives*, 574 F.2d 1002, 1004 (9th Cir. 1978). *See Pate v. Robinson*, 383 U.S. 375, 385 (1966) (where evidence raises bona fide doubt as to defendant's competency, court must provide a hearing to determine competency notwithstanding defendant's failure to request one); *de Kaplany v. Enomoto*, 540 F.2d 975, 979-81 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977) (competency hearing required where record as a whole, including testimony and events at trial, raises genuine doubt in mind of trial judge as to defendant's competency to stand trial).

1001. *Drope v. Missouri*, 420 U.S. 162, 180 (1975) (relevant evidence includes defendant's irrational behavior, his demeanor at trial, and medical opinion). *See United States v. Ives*,

In state court, the trial judge's obligation to hold a competency hearing derives solely from the requirements of due process.¹⁰⁰² In the federal courts, the competency issue is raised by a motion made pursuant to 18 U.S.C. section 4244.¹⁰⁰³ The Ninth Circuit has held that an initial section 4244 motion gives the moving party the right to a mandatory psychiatric examination of the defendant.¹⁰⁰⁴ The trial court may not use its discretion to deny the motion on the ground that there exists no reason to doubt the defendant's competency.¹⁰⁰⁵ However, upon a subsequent section 4244 motion, the trial judge, after considering "all

574 F.2d 1002, 1004 (9th Cir. 1978) ("defendant's bizarre actions or statements, or counsel's statement that the defendant is incapable of cooperating in his own defense, or even psychiatric testimony *need not alone* raise sufficient doubt."). See also *Tillery v. Eyman*, 492 F.2d 1056, 1059 (9th Cir. 1974) (trial court erred in failing to hold a hearing when substantial evidence before the court, including defendant's outbursts in the courtroom and bizarre, irrational behavior in confinement, indicated that he "may have been mentally incompetent to stand trial").

1002. *United States v. Ives*, 574 F.2d 1002, 1004 n.3 (9th Cir. 1978). The Ninth Circuit will not disturb a state court's finding of a defendant's competency if the state court has provided a constitutionally adequate hearing on the competency issue. See, e.g., *Myers v. Rhay*, 577 F.2d 504, 509-10 (9th Cir.), *cert. denied*, 439 U.S. 968 (1978). In *Myers*, the Ninth Circuit affirmed the district court's refusal to grant a habeas corpus petitioner an evidentiary hearing on the issue of his competency and refused to independently examine the psychiatric record in the case. In an extensive evidentiary hearing, the state court trial judge had found Myers competent to stand trial. There was no procedural defect in the hearing process, and the determination of Myers' competency had been affirmed by the state court of appeal. Because the procedure observed by the state court was constitutionally adequate, comporting with the standards set forth in *Drope*, the district court did not abuse its discretion in refusing to conduct a new hearing on the issue of Myers' competency.

When a constitutionally adequate hearing has been held, the Ninth Circuit will overturn a district court's determination of competency only when the finding was clearly erroneous. See, e.g., *United States v. Aponte*, 591 F.2d 1247 (9th Cir. 1978). In *Aponte*, the Ninth Circuit found no error in the trial court's determination of the defendant's competency. Although at trial the government's psychiatrist had stated that Aponte possessed a paranoid personality and the court appointed psychiatrist had testified that Aponte was "acutely psychotic and incompetent," the Ninth Circuit concluded that "[t]he district court's determination of Aponte's competency to stand trial is a finding of fact which may be set aside only if it is clearly erroneous. We cannot say that the judge's competence determination was clearly erroneous in this case." *Id.* at 1249.

1003. 18 U.S.C. § 4244 (1976) provides in part:

Whenever . . . the United States Attorney has reasonable cause to believe that a person . . . may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. . . . If the report . . . indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing . . . and make a finding with respect thereto.

1004. *United States v. Ives*, 574 F.2d 1002, 1005 (9th Cir. 1978).

1005. *Id.* See *Meador v. United States*, 332 F.2d 935, 937-38 (9th Cir. 1964).

available pertinent information,"¹⁰⁰⁶ may determine that there is insufficient doubt as to the defendant's competency to require a hearing.¹⁰⁰⁷ While "appellate review of a failure to provide *any* hearing on a defendant's competence to stand trial is 'comprehensive and not limited by either the abuse of discretion or clearly erroneous standard',"¹⁰⁰⁸ the trial judge's decision to deny a subsequent section 4244 motion will not be reversed absent an abuse of discretion.¹⁰⁰⁹

In *United States v. Ives*,¹⁰¹⁰ the Ninth Circuit reversed the defendant's murder conviction, concluding that under the circumstances the trial court had abused its discretion in denying a subsequent section 4244 motion. Although four different determinations on the issue of the defendant's competency had been made in less than one year,¹⁰¹¹ the trial court refused to consider the testimony of two psychiatrists and a deputy U.S. marshal that was offered to prove a change in Ives' competency in the five months since his last psychiatric examination. This refusal was held to violate Ives' due process rights, which require "evaluation of all available pertinent information as a basis for establishing whether doubt of the defendant's competency is sufficient to warrant a hearing . . . [G]iven the frequent fluctuations in Ives' competency to stand trial, the court's refusal to consider evidence of another possible change constituted an abuse of that discretion."¹⁰¹² Because Ives' competency at the time of trial could not be established in a new hearing,¹⁰¹³ the Ninth Circuit granted a new trial.

1006. 574 F.2d at 1006.

1007. *Id.* at 1005. See *United States v. Cook*, 418 F.2d 321, 324 (9th Cir. 1969).

1008. 574 F.2d at 1005 n.3 (emphasis added) (quoting *de Kaplany v. Enomoto*, 540 F.2d 975, 983 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977)).

1009. *Id.* at 1005.

1010. 574 F.2d 1002 (9th Cir. 1978).

1011. Ives was indicted for murder in March 1971, but following a court ordered examination he was found incompetent to stand trial and was committed. In a second hearing the court found him competent, and his trial began. Thereafter, a mistrial was declared and, following a third hearing, he was adjudged incompetent and recommitted. Once again the district court found Ives to be competent and a second jury trial, the subject of the current appeal, began. *Id.* at 1004.

1012. *Id.* at 1006-07.

1013. Six years had elapsed since trial, the judges in both previous trials were dead, and no psychiatric testimony existed of Ives' competency at the time the error had occurred. *Id.* at 1007. See also *Bassett v. McCarthy*, 549 F.2d 616 (9th Cir.), *cert. denied*, 434 U.S. 849 (1977). The *Bassett* court discussed the difficulties involved in ruling on an appellant's claim that he was improperly denied a competency hearing at the trial court level. While claims based on the issue of competency are likely to arise in cases where it is apparent that the defendant is mentally impaired to some extent, the appellate court must "sift the record of abnormal behavior for evidence which might, at a hearing on the issue of competence, be found to be relevant and material to competency." The trial record, however, is one "in

4. Entrapment

The affirmative defense¹⁰¹⁴ of entrapment requires that the defendant present evidence of his nonpredisposition to violate the law and of government inducement to commit the charged offense.¹⁰¹⁵ The defense will be unsuccessful if the court finds either the defendant predisposed to commit the crime or government inducement lacking.¹⁰¹⁶ "Entrapment *as a matter of law* exists only when there is undisputed testimony making it patently clear that an otherwise innocent person was induced to commit the act complained of by the trickery, persuasion or fraud of a government agent."¹⁰¹⁷ Entrapment is a defense, not in the sense that the defendant goes free though guilty but, rather, that the government "cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct."¹⁰¹⁸

The proper inquiry for the jury is whether or not the defendant was an unwilling participant in the criminal act.¹⁰¹⁹ An "unwilling" defendant denotes one who is not predisposed to violate the law on any

which the parties presumably did not address the issue of the defendant's competency, and from which the evidence of petitioner's demeanor and attitude and of his understanding and cooperation may therefore be largely missing." *Id.* at 618-19.

1014. In *United States v. Demma*, 523 F.2d 981, 982 (9th Cir. 1975) (en banc), the Ninth Circuit reversed the rule that entrapment constituted a confession-and-avoidance defense requiring the defendant to admit all elements of the crime. A defendant may now claim entrapment without conceding that he committed the crime or any of its elements.

1015. *United States v. Hermosillo-Nanez*, 545 F.2d 1230, 1232 (9th Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1050 (1977) (defendant's conviction for possession of heroin affirmed). See *United States v. Russell*, 411 U.S. 423, 429 (1973) (primary focus of entrapment defense is on defendant's lack of intent or predisposition to commit crime); *United States v. Donoho*, 575 F.2d 718, 719 (9th Cir. 1978) (per curiam) ("That defense [entrapment] has two elements: a government official must have induced the defendant to commit the crime; and the defendant must not have been predisposed to commit the crime.").

1016. *United States v. Russell*, 411 U.S. 423, 433-36 (1973) (evidence showed that prior to government involvement, defendant had been involved in criminal drug ring).

1017. *United States v. Rangel*, 534 F.2d 147, 149 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976) (emphasis added) (affirming defendant's conviction for possession of heroin). See *United States v. Prairie*, 572 F.2d 1316, 1319-20 (9th Cir. 1978) (in light of defendant's previous experience in drug trafficking, entrapment could not be found to exist as matter of law, and issue of entrapment was properly submitted to jury).

1018. *Sorrells v. United States*, 287 U.S. 435, 452 (1932). In *United States v. Price*, 577 F.2d 1356, 1367 (9th Cir. 1978), the Ninth Circuit affirmed the defendant's conviction for conspiracy to transport women in interstate commerce for purposes of prostitution. The circuit court found that the trial court had not erred in refusing to give instructions on the entrapment defense to the jury, because the crime of conspiracy was complete when the defendant first discussed the venture. This overt act, completing the conspiracy, occurred at a time when no government agent had yet become involved.

1019. *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1334-36 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (affirming defendant's conviction for distribution of heroin, hold-

propitious opportunity.¹⁰²⁰ Predisposition is a question of fact,¹⁰²¹ and a conviction will not be overturned unless the jury rationally could not have concluded that predisposition existed.¹⁰²² The Ninth Circuit has cited several factors as relevant in determining whether the defendant was predisposed. A proper inquiry may include consideration of the defendant's prior criminal record,¹⁰²³ whether the suggestion of the criminal activity was first made by the government, whether the defendant engaged in the criminal activity for profit, and whether the defendant evidenced reluctance to commit the offense that was overcome only by repeated government inducement or persuasion.¹⁰²⁴

In *United States v. Donoho*,¹⁰²⁵ the Ninth Circuit refused to reverse the defendant's conviction for possession of unregistered firearms. This decision rested in part on the Ninth Circuit's nonacceptance of the defendant's theory of entrapment. To support his theory, the defendant offered evidence of specific instances of conduct reflecting favorably on his character. The trial court, however, held the evidence to be inadmissible. The Ninth Circuit explained that, although instances of conduct are admissible when character is an essential element of a defense,¹⁰²⁶ the defense of entrapment consists solely of government

ing that evidence of mere solicitation by government agent was insufficient to prove entrapment).

1020. *United States v. Glassel*, 488 F.2d 143, 146 (9th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974) (defendant's conviction for possession of cocaine affirmed where evidence of entrapment was insufficient to submit that issue to jury).

1021. *Osborn v. United States*, 385 U.S. 323, 331 (1966) (determination of defendant's predisposition is within province of jury).

1022. *United States v. Donoho*, 575 F.2d 718, 720 (9th Cir. 1978) (per curiam).

1023. *See, e.g., United States v. Segovia*, 576 F.2d 251, 252-53 (9th Cir. 1978). In *Segovia*, the Ninth Circuit affirmed the defendant's conviction for possession of cocaine. Although the defendant contended that the trial court had improperly admitted evidence of his previous dealings in marijuana, the circuit court held that evidence of a defendant's prior illegal conduct is relevant to the issue of his predisposition when it tends to prove that the defendant was engaged in illegal operations similar to those charged. In this case, the defendant's distribution of marijuana was found to be sufficiently similar to the current charges to be relevant to the issue of his predisposition. It was further determined that the probative value of such evidence outweighed its potential for prejudice and was therefore admissible.

1024. *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). *See Pulido v. United States*, 425 F.2d 1391, 1393-94 (9th Cir. 1970) (reasonable to conclude that where defendant was not an addict, government's emotional appeal to a physical need for narcotics did not become coercive, and, therefore, predisposition existed).

1025. 575 F.2d 718 (9th Cir. 1978) (per curiam).

1026. FED. R. EVID. 405(b) provides that "[i]n cases in which character or a trait of character of a person is an essential element of a . . . defense, proof may . . . be made of specific instances of . . . conduct."

inducement and nonpredisposition; it does not include character.¹⁰²⁷

Once the defendant has introduced evidence of his nonpredisposition and of government inducement, the government has the burden of showing that entrapment did not occur.¹⁰²⁸ The trial court may, however, determine that the defendant's evidence is insufficient to warrant submission of the entrapment issue to the jury.¹⁰²⁹ In such cases, the defendant may still attempt to prove a violation of his due process rights.¹⁰³⁰

VI. POST-CONVICTION PROCEEDINGS

A. Sentencing

1. Review

The broad discretion granted a sentencing judge is subject to limited review when the duration of the sentence falls within statutorily prescribed limits.¹⁰³¹ When a court imposes a sentence in excess of the maximum term authorized under the statute, however, the sentence is illegal and may be corrected under rule 35 of the Federal Rules of Criminal Procedure.¹⁰³² A defendant may argue on appeal that his

1027. *United States v. Donoho*, 575 F.2d 718, 719-20 (9th Cir. 1978) (per curiam). The *Donoho* court explained:

The inducement concerns actions taken by persons other than the defendant, and the predisposition concerns the defendant's state of mind prior to the inducement.

We recognize that proof of character may be relevant to the entrapment defense because it may make more probable than not that a defendant possessed a certain state of mind. It is the state of mind itself, however, and not the method of proving the state of mind, which operates as an essential element of the defense [P]redisposition may be shown by methods other than proof of character Because proof can be made by several methods, character is not even an essential method of proof, much less an essential element of the defense itself.

1028. *Pulido v. United States*, 425 F.2d 1391, 1393 (9th Cir. 1970).

1029. *United States v. Glaeser*, 550 F.2d 483, 487-88 (9th Cir. 1977) (mere fact that government agents made initial contact with defendant is evidence only that government furnished opportunity and will not, alone, support submission of entrapment issue to jury).

1030. See notes 986-97 *supra* and accompanying text.

1031. *United States v. Washington*, 578 F.2d 256, 258 (9th Cir. 1978) (imposition of maximum prison term for failure to appear for sentencing within discretion of sentencing judge); *United States v. Taxe*, 572 F.2d 216 (9th Cir.), *cert. denied*, 436 U.S. 918 (1978) (no abuse of discretion in refusing to merge numerous violations into single course of conduct for sentencing purposes); *United States v. Moreno*, 569 F.2d 1049 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978) (imposition of 70-year sentence for distributing and dispensing heroin within discretion of sentencing judge).

1032. FED. R. CRIM. P. 35 provides in part: "The court may correct an illegal sentence at any time and may correct an illegal sentence imposed in an illegal manner within the time provided . . . for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed"

Rule 35 provides two forms of relief: reduction of sentence and correction of an illegal

sentence, although within statutory limits, is unduly harsh. Absent some showing of abuse of discretion or illegality, the Ninth Circuit will summarily affirm such sentences as beyond review.¹⁰³³ In *United States v. Moreno*,¹⁰³⁴ for example, the defendants challenged the length of their sentences, alleging improper judicial motivation. The Ninth Circuit expressly withheld review of this claim, reasoning that the sentences were within the bounds prescribed by statute and, therefore, within the trial judge's discretion.¹⁰³⁵

2. Information that may be considered

The trial judge may consider a range of information, largely unlimited as to its nature or source.¹⁰³⁶ Although the court may consider hearsay evidence of unproven criminal conduct contained in the presentence report,¹⁰³⁷ due process requires that unwarranted weight not be given to such information in formulating the sentence.¹⁰³⁸ In *United States v. Weston*,¹⁰³⁹ the Ninth Circuit recognized the difference between reviewing a sentence and deciding that certain types of informa-

sentence. The motion for reduction of sentence is essentially a plea to the sentencing court for leniency and therefore falls squarely within the discretion of the sentencing judge.

1033. *United States v. Kearney*, 560 F.2d 1358, 1369 (9th Cir. 1977) (defendant challenged length of sentence as disproportionate to involvement in criminal conspiracy); *United States v. Ramirez-Aguilar*, 455 F.2d 486 (9th Cir. 1972) (sentence for being in United States illegally not reviewable when within bounds prescribed by statute).

1034. 569 F.2d 1049 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978).

1035. *Id.* at 1053. *See also* *United States v. Washington*, 578 F.2d 256, 259 (9th Cir. 1978) (court's inquiry is whether penalty imposed is so out of proportion to crime committed as to shock a balanced sense of justice).

1036. *United States v. Tucker*, 404 U.S. 443, 446 (1972). In *Williams v. New York*, 337 U.S. 241 (1949) the Court observed:

Highly relevant—if not essential—to . . . [the sentencing judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning defendant's life and characteristics. And modern concepts have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Id. at 247.

1037. *United States v. Wondrack*, 578 F.2d 808 (9th Cir. 1978) (sentencing judge expressly relied on probation officer's conclusion that defendant's miscellaneous income was derived from illegal narcotics trafficking); *Gelfuso v. Bell*, 590 F.2d 754 (9th Cir. 1978) (sentencing judge made reference to defendant's possible involvement with organized crime).

Furthermore, this position seems to be congressionally mandated. *See* 18 U.S.C. § 3577 (1976), which states: "No limitation shall be placed on information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

1038. *Gelfuso v. Bell*, 590 F.2d 754 (9th Cir. 1978).

1039. 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972).

tion should not be considered in formulating that sentence. This distinction allows a sentence to be reviewed and vacated when it is premised on unverified allegations of serious criminal conduct.¹⁰⁴⁰

The defendant in *United States v. Wondrack*,¹⁰⁴¹ for example, was convicted of tax evasion. After expressly relying on a probation officer's conclusion that the "probable source" of the defendant's miscellaneous income was from trafficking in narcotics, the district judge increased the sentence that otherwise would have been imposed. The defendant's miscellaneous income amounted to \$125,000. Alleging that this hearsay evidence was not sufficiently supported to pass the *Weston* standard, the defendant filed a motion to vacate his sentence. The court noted that for several years prior to the year in question the defendant's income had not exceeded \$13,000 annually and that the defendant had worked as a cargo handler for an international airline. The court's finding that Wondrack's miscellaneous income probably was acquired through drug dealings or some other illegal activity was not "entirely without support" and, therefore, properly considered by the sentencing judge.¹⁰⁴²

Consideration of improper information in formulating sentence is alleged frequently on appeal. Such attacks, however, are disposed of generally on the basis of the trial court's disavowal of any reliance on the challenged information.¹⁰⁴³

The Supreme Court in *Gardner v. Florida*¹⁰⁴⁴ concluded that a defendant was denied due process of law when the death sentence was imposed at least in part on the basis of information contained in a pre-sentence report that he had had no opportunity to deny or explain. While recognizing that fundamental fairness requires that a defendant be told the substance of all derogatory information that adversely af-

1040. Convicted of receiving, concealing and facilitating transportation of heroin, Weston was initially sentenced to five years imprisonment. The prosecution demurred and asked that a pre-sentence report be obtained. The pre-sentence report asserted, on belief, that Weston was one of the large distributors of narcotics in the area. After considering this pre-sentence report, the judge imposed a maximum 20-year sentence. Reasoning that the increase in sentence was "[b]ased on unsworn evidence detailing otherwise unverified statements of a faceless informer," the appellate court found that the sentencing judge had relied improperly on the information contained in the pre-sentence report. *Id.* at 631.

1041. 578 F.2d 808 (9th Cir. 1978).

1042. 578 F.2d at 810.

1043. *See* Chard v. United States, 578 F.2d 1317 (9th Cir. 1978) (no error in district judge's refusal to order hearing on alleged inaccuracies in pre-sentence memorandum); *United States v. Stevenson*, 573 F.2d 1105 (9th Cir. 1978) (no due process violation as there was no indication judge materially relied upon speculative and unsupported information in pre-sentence report).

1044. 430 U.S. 349 (1977).

fects his interests and has not been disclosed in open court,¹⁰⁴⁵ the Ninth Circuit continues to allow nondisclosure in noncapital cases when the sentence determination has been made in only partial reliance on the withheld information.¹⁰⁴⁶

3. Consecutive sentences

A court normally may impose consecutive sentences on a defendant for each offense. The propriety of consecutive sentences turns on whether the legislature defined several distinct offenses that could be committed during the course of a single transaction, or instead defined a single offense with progressively greater sanctions for aggravating circumstances.¹⁰⁴⁷ The Ninth Circuit has not favored separating essentially unitary transactions into their component parts in order to exact consecutive sentences in excess of the authorized maximum penalty for a single offense.¹⁰⁴⁸

4. Increase in sentence

A court may not impose a greater sentence upon retrial following a successful appeal in retaliation for the defendant's assertion of procedural rights.¹⁰⁴⁹ To ensure the absence of such motivation, a more se-

1045. *United States v. Dubrofsky*, 581 F.2d 208, 214-15 (9th Cir. 1978) (quoting *United States v. Perri*, 513 F.2d 572, 575 (9th Cir. 1975)) (maintaining secrecy of government investigation held a proper basis for nondisclosure when sentencing judge did not rely exclusively on confidential memorandum).

1046. *See Pavao v. Cardwell*, 583 F.2d 1075, 1078 (9th Cir. 1978) (maintaining integrity of ongoing police investigation justified excising portion of pre-sentence report when consideration of excised portion in no way influenced sentence determination).

1047. *See United States v. Dubrofsky*, 581 F.2d 208, 213-14 (9th Cir. 1978) (consecutive sentencing within court's discretion when importation and distribution each comprised a distinct crime); *United States v. Taxe*, 572 F.2d 216, 217 (9th Cir.), *cert. denied*, 436 U.S. 918 (1978) (no abuse of discretion in refusing to merge numerous discrete violations into a single course of conduct for sentencing purposes, when merger would retard statute's deterrent effect).

1048. In *United States v. Clements*, 471 F.2d 1253, 1254 (9th Cir. 1972), the court stated: "Unless we can find from the face of the Act or from its legislative history a clear indication that Congress intended to authorize multiple punishments for a single transaction, we are obliged to construe the Act against the harsher penalties that result from cumulative punishments."

1049. *North Carolina v. Pearce*, 395 U.S. 711, 723-25 (1968) (imposition of greater sentence improper when no reason "based upon objective information concerning identifiable conduct . . . of defendant . . . after . . . the original sentencing" appears in record to justify increase); *United States v. Lincoln*, 581 F.2d 200, 201 (9th Cir. 1978) (subsequent increase in sentence proper when based on presentence report showing only negative information); *United States v. Young*, 573 F.2d 1137, 1140 (9th Cir. 1978) (greater sentence proper when imposed in reliance on subsequent indictment alleging narcotics trafficking occurring subsequent to original sentencing).

vere sentence after retrial must be justified by actions of the defendant occurring after the original sentencing and affirmatively appearing as part of the record.¹⁰⁵⁰ Tried twice previously for the same offense, the defendant in *United States v. Young*,¹⁰⁵¹ for example, was convicted of conspiracy to possess cocaine with intent to distribute. The court imposed a six-year sentence and the defendant appealed, contending that the sentence should not have exceeded the three-year sentence imposed at the first trial. The Ninth Circuit, however, found the increase to be properly based upon an indictment alleging narcotics trafficking that occurred *concurrently* with the offense for which the defendant was convicted but which was not revealed until after the second trial. Adding to the trial judge's understanding of the defendant's personal characteristics, this information was properly considered in formulating the ultimate sentence.¹⁰⁵²

If the court imposes sentence in an illegal manner, the same court may resentence the defendant even though the correction may increase the punishment initially pronounced.¹⁰⁵³ When service of the legal portion of a sentence has commenced, however, the court may not increase or make more severe the valid portion of the sentence originally imposed.¹⁰⁵⁴

In *United States v. Best*,¹⁰⁵⁵ for example, the court disapproved an attempt to impose in a lawful manner that portion of the prior sentence that, as originally imposed, was excessive. The defendant had been convicted on all three counts of an information charging him with aiding and abetting aliens to elude examination and inspection and was sentenced to six-months imprisonment on each count, sentences to run concurrently. The court further imposed a three-year probationary term to run consecutively with the prison term. As the maximum sentence allowed by statute on each count was six months in prison, the probationary term was excessive and, therefore, illegal. The court, upon the defendant's motion to correct the excessive sentence, resented the defendant to six months in prison on count one and concur-

1050. *North Carolina v. Pearce*, 395 U.S. 711, 726 (1968).

1051. 573 F.2d 1137 (9th Cir. 1978). The guilty verdict in the first trial was vacated and a mistrial declared in the second. *Id.* at 1139.

1052. *Id.* at 1140-41.

1053. *United States v. Stevens*, 548 F.2d 1360, 1362 (9th Cir.), *cert. denied*, 430 U.S. 975 (1977) (proper to increase sentence to conform to that specifically required by law).

1054. *Kennedy v. United States*, 330 F.2d 26, 27 (9th Cir. 1964) (where statute fixed maximum penalty at five years, ten-year concurrent sentences for breaking and entering were void only as to excessive five years).

1055. 571 F.2d 484 (9th Cir. 1978).

rent probation terms of three years on counts two and three. Reasoning that this sentence amounted to an increase of the valid portion of the defendant's original sentence, the Ninth Circuit held it to be precluded by double jeopardy.¹⁰⁵⁶

5. Computation of time served

A defendant in the Ninth Circuit has no constitutional right to credit for time served prior to sentencing unless the sentence received was the statutory maximum and the pre-sentence incarceration was the result of indigency.¹⁰⁵⁷ A sentence shorter than the statutory maximum is presumed to include credit for pre-sentence time served.¹⁰⁵⁸

Sentencing under the Federal Youth Corrections Act¹⁰⁵⁹ is designed to provide treatment and rehabilitation, rather than retribution, for youthful offenders under twenty-two years of age.¹⁰⁶⁰ The Act provides that the youth shall be released conditionally within four years from the date of conviction.¹⁰⁶¹ The Ninth Circuit, in *Ogg v. Klein*,¹⁰⁶² was asked to decide whether an escape tolled a youth offender's sentence. Shortly after incarceration, Ogg walked away from the facility without permission and remained on escape status for nearly five years. Eventually surrendering, he was released on his own recognizance pending an appearance to initiate proceedings on the escape charge. The United States Bureau of Prisons, contending that Ogg had yet to serve the remainder of his sentence, directed the United States Marshall to take Ogg into custody. Ogg then filed a habeas corpus action requesting release. He argued that he must be released after the expiration of four years from the date of conviction and that those four years had passed. Reasoning that an escape does and should toll the youth offender's sentence, the court denied Ogg's petition for habeas corpus relief.¹⁰⁶³

6. Cruel and unusual punishment

The Ninth Circuit has interpreted the eighth amendment prohibition against cruel and unusual punishment¹⁰⁶⁴ to preclude penalties "so

1056. *Id.* at 486.

1057. *Hook v. Arizona*, 496 F.2d 1172, 1173-74 (9th Cir. 1974).

1058. *Id.*

1059. 18 U.S.C. §§ 5005-5026 (1976).

1060. *Dorszynski v. United States*, 418 U.S. 424, 433 (1974).

1061. 18 U.S.C. § 5017(c) (1976).

1062. 572 F.2d 1379 (9th Cir. 1978).

1063. *Id.* at 1382.

1064. U.S. CONST. amend. VIII.

out of proportion to the crime committed that it shocks a balanced sense of justice'.¹⁰⁶⁵ The defendant in *United States v. Washington*¹⁰⁶⁶ was charged in a one-count indictment with aiding and abetting mail theft, a felony, but was allowed to plead guilty to obstruction of the mail, a misdemeanor. A date was set for sentencing, but the defendant did not appear. He was later convicted of failure to appear and sentenced to five-years imprisonment. Reasoning that the sentence, when considered in light of the defendant's direct affront to the authority of the court, did not reveal the required gross disparity, the Ninth Circuit concluded that the sentence did not constitute cruel and unusual punishment.¹⁰⁶⁷

B. Appeals

1. Finality

Section 1291 of the Judicial Code¹⁰⁶⁸ vests the federal courts of appeals with jurisdiction of appeals from all final decisions of the district courts of the United States, the Canal Zone, Guam and the Virgin Islands. Appellate review is not a constitutional right; it is purely statutory and arises only after the trial court has rendered a final decision in the case.¹⁰⁶⁹

The imposition of sentence is the final judgment in a criminal case.¹⁰⁷⁰ In *United States v. Richardson*,¹⁰⁷¹ however, the Ninth Circuit recognized an exception to the final judgment rule for collateral orders that would not be subject to effective post-judgment review. The *Richardson* court found jurisdiction to review a pre-trial denial of a motion to dismiss an indictment on double jeopardy grounds.¹⁰⁷²

The Ninth Circuit traditionally had held that such an order was not within the collateral order exception¹⁰⁷³ developed by the Supreme

1065. *United States v. Holman*, 436 F.2d 863, 866 (9th Cir.), *cert. denied*, 402 U.S. 913 (1970) (eight-year prison sentence for narcotics violations not cruel and unusual punishment) (quoting *Gallego v. United States*, 276 F.2d 914, 918 (9th Cir. 1960)).

1066. 578 F.2d 256 (9th Cir. 1978).

1067. *Id.* at 258. See also *Territory of Guam v. Sablón*, 584 F.2d 340 (9th Cir. 1978) (statute mandating life imprisonment for first-degree murder upheld against cruel and unusual punishment challenge).

1068. 28 U.S.C. § 1291 (1976).

1069. *Id.*

1070. *Berman v. United States*, 302 U.S. 211, 212 (1937) (imposition, rather than execution, of sentence effects finality).

1071. 580 F.2d 946 (9th Cir. 1978).

1072. *Id.* at 947.

1073. See, e.g., *United States v. Young*, 544 F.2d 415, 416 (9th Cir.), *cert. denied*, 429 U.S.

Court in *Cohen v. Beneficial Industrial Loan Corp.*¹⁰⁷⁴ The Supreme Court, however, in *Abney v. United States*¹⁰⁷⁵ expressly held that "[a]lthough . . . a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the 'small class of cases' that *Cohen* has placed beyond the confines of the final-judgment rule."¹⁰⁷⁶

2. Jurisdiction

Rule 4(b) of the Federal Rules of Appellate Procedure fixes the time for all appeals in criminal cases as "within 10 days after the entry of the judgment or order appealed from."¹⁰⁷⁷ Failure to satisfy this requirement deprives the appellate court of jurisdiction to hear the appeal.¹⁰⁷⁸ In *Hayward v. Britt*,¹⁰⁷⁹ the defendant filed a motion for reconsideration of judgment after his appeal time had expired. Aware that his appeal period had run, the appellant also asked that, if this motion was denied, the court vacate the original judgment and reenter it, thereby permitting a timely appeal to be made. Denying the motion for reconsideration, the trial court vacated and reentered the judgment and from this, the defendant then made a timely appeal. Observing that "[t]he

1024 (1976) (claim of double jeopardy does not concern a purely collateral matter and review should be postponed until final judgment).

1074. 337 U.S. 541 (1949). In a stockholder's derivative action, the district court denied the defendant's motion to require the plaintiff to give security for costs and expenses, pursuant to a New Jersey statute. The Supreme Court held that the order of denial was final and appealable. Mr. Justice Jackson, writing for the majority, observed:

[T]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. . . .

We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

Id. at 546-47.

1075. 431 U.S. 651 (1977).

1076. *Id.* at 659. See also *Stack v. Boyle*, 342 U.S. 1, 12 (1951) ("[I]t is a final decision that Congress has made reviewable. . . . While a final judgment is always a final decision, there are instances in which a final decision is not a final judgment.") (separate opinion of Jackson, J.) (citations omitted).

1077. FED. R. APP. P. 4(b).

1078. *Smith v. United States*, 425 F.2d 173, 174 (9th Cir. 1970) (oral declaration did not constitute compliance with the notice of appeal filing requirements).

1079. 572 F.2d 1324 (9th Cir. 1978).

vacation and reinstatement of the judgment are an attempt to circumvent the time requirements for the filing of an appeal,"¹⁰⁸⁰ the Ninth Circuit concluded that the motion to reconsider was insufficient to confer appellate jurisdiction.¹⁰⁸¹

Except when further prosecution would place the accused in double jeopardy, the government is given the right of appeal from an order dismissing all or part of an indictment or information.¹⁰⁸² In a state criminal prosecution removed to federal court, the state has a similar right of appeal under 18 U.S.C. section 3731.¹⁰⁸³

3. Standard of review

Underlying the Federal Rules of Criminal Procedure is the philosophy that it is wise to leave the details of procedure to the informed discretion of the trial court.¹⁰⁸⁴ The appellate courts, therefore, will review trial proceedings only to determine whether the trial court has abused its discretion.¹⁰⁸⁵ In *United States v. Gay*,¹⁰⁸⁶ for example, a defendant moved for severance upon the claim that the testimony of a co-defendant would exculpate him. The co-defendant stated that he would testify, but only if tried first. The trial court rejected the conditional offer to testify and denied the motion to sever. Following a joint trial, all defendants were convicted as charged. The defendant appealed, claiming that his motion for a separate trial was improperly denied. The Ninth Circuit recognized that "the decision to grant the severance [was] within the discretion of the court"¹⁰⁸⁷ and held that "review on appeal is limited to whether . . . the joint trial . . . [was] so prejudicial . . . as to require the exercise of that discretion in only one way, by ordering a separate trial."¹⁰⁸⁸

1080. *Id.* at 1325.

1081. *Id.*

1082. *Arizona v. Manypenny*, No. 77-3453 (9th Cir. July 31, 1978).

1083. 18 U.S.C. § 3731 (1976).

1084. The Ninth Circuit in 1978 continued to recognize several matters as peculiarly within the discretion of the trial judge. *E.g.*, *United States v. Richardson*, 588 F.2d 1235 (9th Cir. 1978) (motion to depose proposed witness); *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978) (scope of voir dire examination); *United States v. Shields*, 571 F.2d 1115 (9th Cir. 1978) (admission into evidence of potentially prejudicial information).

1085. *See, e.g.*, *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978) (scope of voir dire is directed to the sound discretion of the trial court); *United States v. McDonald*, 576 F.2d 1350 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978) (refusal to grant motion for severance will not be reversed absent an abuse of discretion).

1086. 567 F.2d 916 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978).

1087. *Id.* at 919 (quoting *Davt v. United States*, 405 F.2d 312, 314 (9th Cir. 1968), *cert. denied*, 402 U.S. 945 (1971)).

1088. 567 F.2d at 919 (quoting *United States v. Ragghianti*, 527 F.2d 586, 587 (9th Cir.

Although the trial court's findings of fact are not conclusive on appeal, there is a heavy burden on the party seeking to disturb them. A finding of fact must be "clearly erroneous" to warrant reversal on appeal.¹⁰⁸⁹ Although supporting evidence may be available, a finding is clearly erroneous when the reviewing court, on the entire record, is "left with the definite and firm conviction that a mistake has been committed."¹⁰⁹⁰ This standard, however, does not apply to the district court's conclusions of law.¹⁰⁹¹ In *United States v. Rosales*,¹⁰⁹² for example, the prosecution appealed a ruling by the district court suppressing the declaration of an alleged co-conspirator.¹⁰⁹³ Following an offer of proof by the Government, the trial judge ruled that a prima facie case of conspiracy had not been established and that the statements must be suppressed. Reasoning that whether facts presented by the Government were sufficient to create a jury question on the existence of a conspiracy was a question of law, rather than a finding of fact, the Ninth Circuit concluded that it was not confined to the "clearly erroneous or some other restricted standard of review" but could exercise independent judgment.¹⁰⁹⁴

Reflecting the reality that jurors may not always be capable of strictly applying the instructions of the court or of basing their verdict exclusively upon the evidence developed at trial, rule 29 of the Federal Rules of Criminal Procedure¹⁰⁹⁵ provides relief to the victim of an improper or irrational verdict. If the evidence is insufficient to sustain a conviction, the defendant, by moving for acquittal, has the opportunity to take the case from the jury and have it determined by the trial judge. Although the Ninth Circuit has not considered the applicability of rule 29 to bench trials, it seems clear that, because the plea of "not guilty" asks the court for a judgment of acquittal, the rule is inapplicable.¹⁰⁹⁶

1975)). *Accord*, *United States v. Uriarte*, 575 F.2d 215 (9th Cir.), *cert. denied*, 439 U.S. 963 (1978) (defendant not unduly prejudiced by trial court's denial of motion for severance).

1089. 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2585 (2d ed. 1971).

1090. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

1091. *See* 5A MOORE'S *FEDERAL PRACTICE* ¶ 52.03[2], at 2662 (2d ed. 1975).

1092. 584 F.2d 870 (9th Cir. 1978).

1093. An undercover agent was prepared to testify to the alleged co-conspirator's declaration naming the defendant as his source of drugs. *Id.* at 872.

1094. *Id.* at 873. The Ninth Circuit reversed the order of the district court, stating, "[W]e think it manifest that a jury could rationally conclude beyond a reasonable doubt that a conspiracy existed." *Id.*

1095. FED. R. CRIM. P. 29 provides in pertinent part: "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction of such offense or offenses."

1096. *See generally* *United States v. Pitts*, 428 F.2d 534, 535 (5th Cir.), *cert. denied*, 400

If the reviewing court finds legal error in the proceedings below, it must determine the degree to which the error is prejudicial.¹⁰⁹⁷ As a general rule, an error of constitutional dimensions is more likely to be found prejudicial than errors of nonconstitutional import.¹⁰⁹⁸ Yet, the Supreme Court, in *Chapman v. California*,¹⁰⁹⁹ held that such constitutional error was not prejudicial per se and can be held harmless if the Government shows the error to be "harmless beyond a reasonable doubt."¹¹⁰⁰ In *United States v. Price*,¹¹⁰¹ the trial court improperly refused to permit a defendant to cross-examine a witness about her relationship with law enforcement officers. While recognizing that in most denial of effective cross-examination cases it would be rare to find the denial harmless,¹¹⁰² the court determined the error in *Price* to be harmless beyond a reasonable doubt.¹¹⁰³

The Ninth Circuit will reverse under the "plain error" rule¹¹⁰⁴ only in those "very exceptional circumstances where reversal is necessary in order to prevent a miscarriage of justice or to preserve the integrity and

U.S. 910 (1970) (as a result of a not guilty plea, sufficiency question properly before court of appeals); *United States v. Besase*, 373 F.2d 120 (6th Cir. 1967) (in nonjury trial, on not guilty plea, sufficiency of evidence should be reviewed).

1097. There are three levels of error, (1) harmless error, (2) reversible error, and (3) plain error. Harmless error does not lead to reversal although properly objected to and raised on appeal. *United States v. Price* 577 F.2d 1356, 1362 (9th Cir. 1978). Reversible error will result in reversal of the conviction when properly objected to and raised on appeal. *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978). If plain error is present, the conviction will be reversed even though there was no objection and the issue was not raised on appeal. *United States v. Rich*, 580 F.2d 929, 938-39 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978).

1098. *See United States v. Valle-Valdez*, 554 F.2d 911, 915-16 (9th Cir. 1977) (constitutional errors distinguished from nonconstitutional errors: the Government must demonstrate that a constitutional error was harmless beyond a reasonable doubt, whereas the defendant must demonstrate that a non-constitutional error was harmful).

1099. 386 U.S. 18 (1967) (prosecutor's comments to jury and court's instruction concerning petitioner's failure to testify not harmless error).

1100. *Id.* at 23-24.

1101. 577 F.2d 1356 (9th Cir. 1978).

1102. *Id.* at 1362-64.

1103. *Id.* at 1362. Although defendant's cross-examination of the witness was limited, her relationship with the police was fully explored on cross-examination by counsel for the co-defendants. The witness testified she had been arrested for possession of marijuana and was cooperating with the county drug enforcement officers, that following a hearing the charge was dropped, and that she had been friendly with the narcotics officer, had worked for him, and had received expense reimbursement of \$34. In addition, the evidence against the defendant, consisting of documentary evidence, several taped conversations, and the testimony of many corroborating witnesses, was overwhelming. While not relating directly to the effectiveness of defendant's right of cross-examination, these facts did bear upon whether any damage was suffered by him. *Id.* *Cf. Bittaker v. Enomoto*, 587 F.2d 400 (9th Cir. 1978) (refusal to apply the harmless error doctrine to denial of right of self-representation).

1104. FED. R. CRIM. P. 52(b).

reputation of the judicial process.”¹¹⁰⁵ When the evidence against a defendant is so strong that the absence of error would not have changed the jury’s verdict, plain error seldom will be found. In *United States v. Giese*,¹¹⁰⁶ for example, the appellant contended that the prosecution committed blatant acts of misconduct during closing argument.¹¹⁰⁷ At the trial, the defendant neither objected to the prosecution’s statements nor asked for curative instructions. When considered in light of the large amount of evidence unaffected by anything the prosecution did during its final arguments, the court held that any impropriety did not amount to plain error.¹¹⁰⁸

Some constitutional errors, particularly those prejudicing rights essential to a fair trial, are reversible without regard to the presence or absence of prejudice.¹¹⁰⁹ The Ninth Circuit has also reversed automatically on the basis of nonconstitutional errors so inherently prejudicial as to obviate the need for inquiry into actual harm.¹¹¹⁰

4. Concurrent sentence doctrine

If the judge chooses concurrent sentences for convictions on multiple counts of an indictment, the “concurrent sentence doctrine” may apply on appeal. Under this rule, a federal appellate court may decline to decide an issue as to a conviction under one count of an indictment if the defendant has been validly convicted under another count and concurrent sentences were imposed.¹¹¹¹ In *United States v. Raborn*,¹¹¹² the

1105. *United States v. Uriarte*, 575 F.2d 215 (9th Cir.), *cert. denied*, 439 U.S. 963 (1978) (admission of rebuttal evidence given in connection with testimony concerning defendant’s prior arrest did not constitute plain error so as to require reversal in absence of objection at trial); *United States v. Segna*, 555 F.2d 226, 231 (9th Cir. 1977) (prosecutor’s erroneous statements shifted burden of proof to defendant, thus denying him of benefits of reasonable doubt standard and amounting to plain error).

1106. 597 F.2d 1170 (9th Cir. 1979).

1107. The trial transcript showed the prosecution had offered personal characterizations of the appellant, calling him “sick,” “a wolf in sheep’s clothing,” and “a very dangerous individual.” The prosecution had further asked the jury to place faith in the government’s credibility and repeatedly commented on the defendant’s failure to produce evidence. *Id.* at 1199.

1108. *Id.*

1109. See *Chapman v. California*, 386 U.S. 18, 23 (1967) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Payne v. Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Tunney v. Ohio*, 273 U.S. 510 (1927) (impartial judge)).

1110. *United States v. Park*, 521 F.2d 1381, 1383 n.1 (9th Cir. 1975) (trial judge’s reading of defendant’s presentence report before determination of guilt was reversible per se).

1111. *United States v. Diaz-Alvarado*, 587 F.2d 1002 (9th Cir. 1978) (in exercise of discretion, court would not examine assertion that trial court erred in failing to give proposed jury instruction on conspiracy charge where defendants were validly convicted under distribution charge and concurrent sentences were imposed for convictions).

1112. 575 F.2d 688 (9th Cir. 1978).

defendant received a five-year sentence for conviction of bribery, false claims and tax evasion, a two-year sentence for accepting a gratuity, and a three-year sentence for filing a false income tax return, all sentences to be served concurrently. On appeal, Raborn made several challenges to his bribery conviction after the court upheld the tax evasion conviction. Observing that the sentences imposed on the bribery and tax counts were to run concurrently, the court refused to consider the issues relating to the bribery conviction.¹¹¹³

5. New trial

Upon a motion by the defendant, the trial court may grant a new trial "if required in the interest of justice."¹¹¹⁴ Federal Rule of Criminal Procedure 33 implicitly denies the trial court the power to order a new trial sua sponte.¹¹¹⁵

A motion for new trial may be joined in the alternative with a motion for judgment of acquittal notwithstanding the verdict under rule 29(c) of the Federal Rules of Criminal Procedure.¹¹¹⁶ In all cases in which the verdict or finding of guilt occurs after June 1, 1978, the defendant will be required to have made a timely motion in district court for a new trial under rule 33 to preserve that possibility should the granted motion of acquittal under rule 29(c) be reversed on appeal.¹¹¹⁷

To prevail in a rule 33 motion, the defense must demonstrate that a new trial would probably produce an acquittal.¹¹¹⁸ In cases involving prosecutorial misconduct, however, the Ninth Circuit applies a more liberal standard of materiality.¹¹¹⁹ In *United States v. Butler*,¹¹²⁰ for example, the appellants contended that the prosecution failed to disclose a promise to a key government witness that charges pending against him would be dismissed if he testified against the defendant. Reasoning that the newly discovered evidence would not have altered the jury's verdict, the trial court denied the defendant's motion for a new trial. The Ninth Circuit reversed, however, holding that the

1113. *Id.* at 690.

1114. FED. R. CRIM. P. 33.

1115. *Id.* ("The court *on the motion of the defendant* may grant a new trial . . .") (emphasis added).

1116. *United States v. Rojas*, 574 F.2d 476, 476 (9th Cir. 1978) (supplemental order).

1117. *Id.*

1118. *United States v. Cervantes*, 542 F.2d 773, 779 (9th Cir. 1976) (availability of informant not sufficient to probably produce an acquittal).

1119. *United States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978) (new trial required if witness' false testimony might have affected the jury's assessment of credibility).

1120. 567 F.2d 885 (9th Cir. 1978).

proper standard of materiality in nondisclosure cases is whether the newly discovered evidence might reasonably have affected the jury's judgment.¹¹²¹ A supplemental finding that the jury probably would have changed its verdict was unnecessary.¹¹²²

C. Habeas Corpus

1. Jurisdiction

The federal writ of habeas corpus embraces all claims by a petitioner that he was "denied rights secured to him under the federal Constitution or other federal law" in pre-conviction proceedings.¹¹²³ The writ is available only to "in custody"¹¹²⁴ petitioners in cases in which the justifying circumstances have not become moot¹¹²⁵ and may be granted by any justice of the Supreme Court, or by any circuit or district court judge within their respective jurisdictions.¹¹²⁶ In *Cervantes v. Walker*,¹¹²⁷ a state prisoner filed a petition for habeas corpus relief challenging the conditions of his probation.¹¹²⁸ Observing that the probation period had expired prior to oral arguments, the Ninth Circuit held the challenge to be moot.¹¹²⁹

2. Relief for federal prisoners

Often employed in lieu of habeas corpus, 28 U.S.C. section 2255 creates a post-conviction procedure on behalf of a prisoner in custody under sentence of a federal court.¹¹³⁰ If this remedy fails or is not ap-

1121. *Id.* at 890.

1122. *Id.* Additionally, the court held that a motion for new trial should have been granted due to the prejudicial effect of the nondisclosure of the defense's ability to fully and fairly present its case. By casting doubt on the prosecution's case and by increasing the scope of their closing argument, the defense could seriously have affected the jury's assessment of the witness' credibility. *Id.* at 891. *Cf.* *United States v. Agurs*, 427 U.S. 97 (1976) (prosecution's failure to tender victim's criminal record to defense did not justify new trial).

1123. 7B MOORE'S FEDERAL PRACTICE § 2202, at 903 (2d ed. 1971).

1124. 28 U.S.C. §§ 2241(c)(1)-(4), 2254(a), 2255 (1976). For purposes of a federal habeas corpus petition by a state prisoner, custody will be determined under state law. *See Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978) (state probationer "in custody" under California law for purposes of federal habeas corpus petition).

1125. U.S. CONST. art. III, § 2. *See Cervantes v. Walker*, 589 F.2d 424, 425 (9th Cir. 1978) (claim of unconstitutional conditions of probation moot where petitioner's three-year probationary period had expired).

1126. 28 U.S.C. § 2241(a) (1976).

1127. 589 F.2d 424 (9th Cir. 1978).

1128. As a condition of probation, *Cervantes* was to submit to a search of his person and property at any time without notice. *Id.* at 425.

1129. *Id.* at 426.

1130. 28 U.S.C. § 2255 (1976) provides in pertinent part: "A prisoner in custody under

plicable, the propriety of the detention may be questioned under the traditional habeas corpus statute, 28 U.S.C. section 2241. On appeal in *Elliot v. United States*,¹¹³¹ the prisoner alleged in a section 2255 motion to vacate or correct sentence that both the sentencing judge and the parole board relied upon false information that the prisoner had been convicted of rape. He further contended that the parole board was not giving serious consideration to his application for parole. The Ninth Circuit held that a motion under 28 U.S.C. section 2255 was not the appropriate vehicle to attack the parole board's actions, but that he should make his claim in a petition for writ of habeas corpus.¹¹³²

Section 2255 grants subject matter jurisdiction to the federal courts to consider motions for post-conviction relief on four grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack.¹¹³³ A sentence attacked collaterally because of a nonconstitutional error of federal law does not, however, automatically warrant relief.¹¹³⁴ The appropriate inquiry in such cases is whether the claimed error of law is a fundamental defect that "inherently results in a complete miscarriage of justice" presenting an "exceptional circumstance" in which the need for the remedy afforded by writ of habeas corpus is apparent.¹¹³⁵ In *Marshall v. United States*,¹¹³⁶ for example, the petitioner, under section 2255, collaterally challenged the government's failure to satisfy the pre-trial notice requirement to proceed against him as a dangerous special offender.¹¹³⁷ Despite petitioner's attempt to frame the notice require-

sentence of a court established by Act of Congress . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."

1131. 572 F.2d 238 (9th Cir. 1978).

1132. *Id.* at 239.

1133. *See, e.g.*, *Portillo v. United States*, 588 F.2d 714 (9th Cir. 1978) (§ 2255 petition alleging sentence had been improperly enhanced upon reliance on invalid conviction); *Hitchcock v. United States*, 580 F.2d 964, 965-66 (9th Cir. 1978) (§ 2255 proceeding to determine whether conviction violated the laws of the United States); *Marshall v. United States*, 576 F.2d 160 (9th Cir. 1978) (remedy for sixth amendment right of confrontation violation under § 2255).

1134. *See, e.g.*, *United States v. Hitchcock*, 580 F.2d 964 (9th Cir. 1978) (not every asserted error of law can be raised on a § 2255 motion); *Marshall v. United States*, 576 F.2d 160 (9th Cir. 1978) (nonconstitutional issues may be collaterally attacked only when some type of extraordinary discrepancy is alleged).

1135. *Lepera v. United States*, 587 F.2d 433, 435 (9th Cir. 1978) (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

1136. 576 F.2d 160 (9th Cir. 1978).

1137. Pre-trial notice required by 18 U.S.C. § 3575(a)(2) (1976) must identify with partic-

ment in constitutional terms, the court held that the notice requirement was clearly statutory in nature, and that this nonconstitutional claim did not present an "exceptional circumstance" constituting a fundamental defect leading to a complete miscarriage of justice.¹¹³⁸

The availability of section 2255 relief for a nonconstitutional error depends upon the degree of error and the injuries alleged. In *Yothers v. United States*,¹¹³⁹ for example, the defendant pleaded guilty to conspiracy to import hashish and was sentenced to five-years imprisonment and a special parole term of two years. Yothers, alleging that he had failed to understand that the special parole term was a mandatory minimum rather than a maximum, filed a section 2255 motion to vacate the conviction and sentence so as to allow him to replead. The court found that the sentencing judge had failed to explain the unique nature and consequences of a special parole term. Such manifest noncompliance with rule 11(c)(1) of the Federal Rules of Criminal Procedure required that the conviction be set aside.¹¹⁴⁰ In *Lepera v. United States*,¹¹⁴¹ however, the district court, under similar circumstances, denied the defendant's section 2255 petition for relief. Lepera had pled guilty in consideration of judicial and prosecutorial representations that he would receive concurrent sentences for convictions of conspiracy to distribute cocaine and parole violation. The court, however, had no authority to make such a promise because the parole board had exclusive jurisdiction to execute the parole violation warrant. The parole board eventually cooperated with the court, executing the parole violation warrant to allow the sentences to run concurrently. Concluding that Lepera had received the sentence bargained for, the Ninth Circuit found no prejudice with respect to total time served.¹¹⁴²

The Ninth Circuit, in 1978,¹¹⁴³ delineated the procedure to be followed by the district courts when a convict files a section 2255 motion claiming a *Tucker* violation. A *Tucker*-type challenge alleges enhancement of the petitioner's sentence because of reliance on an invalid prior conviction.¹¹⁴⁴ Section 2255 *Tucker* petitions ordinarily should be de-

ularity the reasons why the prosecuting attorney believes the defendant to be a dangerous special offender.

1138. 576 F.2d at 162.

1139. 572 F.2d 1326 (9th Cir. 1978).

1140. *Id.* at 1328.

1141. 587 F.2d 433 (9th Cir. 1978).

1142. Lepera asked the court to terminate his case rather than allow him an opportunity to replead. This buttressed the court's conclusion but was not itself pivotal. *Id.* at 436.

1143. *Farrow v. United States*, 580 F.2d 1339 (9th Cir. 1978) (en banc).

1144. *See United States v. Tucker*, 404 U.S. 443 (1972). The Supreme Court stated:

cided by the original sentencing judge. The court recognized that a trial judge's familiarity with the case may lead him to give only pro forma consideration to the petition but concluded that such a danger is not unique to *Tucker*-type cases and that it is necessary to "trust that our judges will rise above such influences."¹¹⁴⁵

Section 2255 requires that an evidentiary hearing be held "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."¹¹⁴⁶ In a case in which the judge's own recollection enables him to determine whether the original sentence might have been different had he then known that the prior convictions were invalid, an evidentiary hearing is not necessary.¹¹⁴⁷ Furthermore, a hearing into the validity of the prior convictions is not required if the judge determines from the record that a new sentence, formulated without reliance on the challenged convictions, would nonetheless be the same.¹¹⁴⁸ It is only when the sentencing judge has found that the original sentence would be inappropriate that the petitioner must be afforded an evidentiary hearing on the validity of the prior convictions.¹¹⁴⁹

Upon reviewing a *Townsend* claim¹¹⁵⁰ pursuant to a section 2255 mo-

"[T]o permit a conviction obtained in violation of *Gideon v. Wainwright*, [372 U.S. 335 (1963)], to be used against a person either to support guilt or to enhance punishment for another offense . . . is to erode the principle of that case." 404 U.S. at 449. The Court went on to proscribe reliance on such invalid convictions to enhance punishment.

1145. *Farrow v. United States*, 580 F.2d 1339, 1350 (9th Cir. 1978) (en banc) (under sentence for jumping bail and failing to pay a special tax on 119 pounds of marijuana, defendant moved to vacate, alleging sentencing court had considered four invalid prior convictions). This same practice is followed with motions to correct or reduce sentence pursuant to FED. R. CRIM. P. 35.

1146. 28 U.S.C. § 2255 (1976).

1147. In *Portillo v. United States*, 588 F.2d 714 (9th Cir. 1978), the defendant moved on due process grounds to vacate his sentence, contending that the sentencing judge had relied on an invalid prior conviction. Denying the motion without an evidentiary hearing, the trial court concluded:

This Judge was, and still is, of the opinion that regardless of the invalidity surrounding . . . [the prior convictions] . . . the facts and circumstances surrounding this particular case dictate fifteen years to be the appropriate sentence for this particular conviction. Thus, no singular prior conviction or materially false assumption, enhanced this petitioner's sentence.

Id. at 715-16.

1148. *Farrow v. United States*, 580 F.2d 1339, 1352-53 (9th Cir. 1978).

1149. *See United States v. Chard*, 578 F.2d 1317, 1318 (9th Cir. 1978) (refusal to grant evidentiary hearing proper where record clearly indicated that allegedly inaccurate memorandum was not relied on in imposing sentence).

1150. *Townsend v. Burke*, 334 U.S. 736 (1948). The Supreme Court reversed the conviction of a defendant who was sentenced on the basis of materially untrue assumptions concerning his criminal record. The Court held that the pronouncement of sentence on a

tion, a sentence will be vacated on appeal only if the challenged information is false and unreliable and, demonstrably, was the basis for the sentence.¹¹⁵¹ It must appear affirmatively in the record that the court based its sentence on improper information.¹¹⁵²

Absent a showing of cause and prejudice, failure to comply with rule 32(a)(1) by presenting "any information in mitigation of punishment" at the time of sentencing may operate as a waiver of a subsequent section 2255 challenge.¹¹⁵³

3. Relief for state prisoners

A state prisoner may petition a federal district court for habeas corpus relief by alleging that he is being held in violation of the Constitution, laws or treaties of the United States.¹¹⁵⁴ In 1978, state prisoners filed habeas corpus petitions challenging the conditions of probation,¹¹⁵⁵ the basis of a guilty plea,¹¹⁵⁶ the adequacy of counsel at trial,¹¹⁵⁷ the revocation of parole absent a hearing,¹¹⁵⁸ and the length of delay prior to trial.¹¹⁵⁹ The defendant in *Bittaker v. Enomoto*,¹¹⁶⁰ for example, sought a writ challenging the state's earlier denial of his right of self-representation.¹¹⁶¹ The court held that such state action was a constitutional defect automatically prejudicing the defendant's interest

materially false foundation that the petitioner had no opportunity to correct because he was without counsel lacked due process of law. *Id.* at 740-41.

1151. *Farrow v. United States*, 380 F.2d 1339, 1359 (9th Cir. 1978).

1152. *Id.*

1153. *Wainwright v. Sykes*, 433 U.S. 72 (1977) (right to review admission of inculpatory statements by habeas corpus waived by failure to object).

1154. 28 U.S.C. §§ 2241-2255 (1976). When a state contains more than one federal judicial district, venue is proper either in the district in which petitioner was convicted and sentenced or in the district in which he is being held. 28 U.S.C. § 2241(d) (1976).

1155. *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978) (as condition of probation, petitioner was subject to search at any time without notice).

1156. *Stone v. Cardwell*, 575 F.2d 724 (9th Cir. 1978) (petitioner, charged with lewd and lascivious acts, pleaded guilty to child molestation pursuant to a plea bargain but received a penalty nearly four times that which he would have received had he pleaded not guilty and been convicted on the original charge).

1157. *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (petitioner cited counsel's repeated failures to move to suppress evidence).

1158. *Heinz v. McNutt*, 582 F.2d 1190 (9th Cir. 1978) (petitioner's parole revoked without final revocation hearing pursuant to Washington statute which permitted automatic revocation of parole for persons convicted of a felony or misdemeanor while on parole).

1159. *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978) (petitioner contended that nine-month delay between arrest and trial resulted in speedy trial violation).

1160. 587 F.2d 400 (9th Cir. 1978).

1161. *See Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970). *See also Faretta v. California*, 422 U.S. 806 (1975) (defendant in state criminal trial has constitutional right of self-representation).

and requiring that the state conviction be set aside.¹¹⁶²

The district court, in a habeas corpus proceeding, will accept state court findings of fact if made after a full and fair hearing and if substantially supported by the record.¹¹⁶³ In *Taylor v. Cardwell*,¹¹⁶⁴ a key prosecution witness stated after trial that his testimony had been false and that the government was aware of the fabrication. The district court appropriately accepted this finding of historical fact.¹¹⁶⁵

Findings of fact need not be accepted by the federal court absent a full and fair evidentiary hearing at the state level. In *Stone v. Cardwell*,¹¹⁶⁶ for example, the petitioner contended that the lengthy sentence imposed was not in accordance with the plea bargain upon which his guilty plea had been based. Stone had suffered a sentence nearly four times as great as that which he would have received had he pleaded not guilty, stood trial, been convicted on all four charges against him, and been given the maximum sentence on all counts with the sentences to run consecutively. Despite this seemingly blatant irregularity,¹¹⁶⁷ the state court found that the petitioner had failed to establish that his sentence was contrary to the plea bargain. To enable the district court to determine whether this finding was the product of a full and fair hearing, fairly supported by the record, the Ninth Circuit remanded the case to allow the petitioner to supplement the record with transcripts of the state proceedings.¹¹⁶⁸

D. Double Jeopardy

1. Separate offenses

The fifth amendment provides that no person shall be "twice put in jeopardy [for the same offense.]"¹¹⁶⁹ Courts frequently have limited the scope of this protection by adopting a narrow concept of an "offense." The plea of former jeopardy is held inapplicable in a second prosecution for an offense that, although committed within the same act or as

1162. 587 F.2d at 402.

1163. See *Gardner v. Pogue*, 568 F.2d 648, 649 (9th Cir. 1978) (adherence to state court's findings of fact).

1164. 579 F.2d 1380 (9th Cir. 1978).

1165. If the state court does not make findings of fact, the district court may make its own findings from the record. The court should conduct an evidentiary hearing for this purpose. *Id.* at 1382-83.

1166. 575 F.2d 724 (9th Cir. 1978).

1167. The Ninth Circuit noted: "If this was indeed pursuant to plea bargain it was a strange bargain." *Id.* at 726.

1168. *Id.* at 726-27.

1169. U.S. CONST. amend. V.

part of the same transaction, is technically separate from the offense forming the basis of the first prosecution.¹¹⁷⁰ In *United States v. Richardson*,¹¹⁷¹ for example, the court imposed consecutive sentences upon convictions of conspiracy to smuggle laetrile and conspiracy to receive and distribute smuggled goods. On appeal, the defendants contended that they were placed in double jeopardy because the conspiracy, while involving two discrete substantive offenses, was but a single agreement. Reasoning that the existence of two conspiracies was a factual question and that the evidence was sufficient to support the trial court finding, the Ninth Circuit held that the imposition of consecutive sentences did not subject the defendants to double jeopardy.¹¹⁷²

To determine whether two offenses are distinct, the federal courts generally compare the statutory definitions to determine whether each requires proof of some element not required by the other.¹¹⁷³ In *United States v. Robbins*,¹¹⁷⁴ for example, the defendant argued that two convictions, one for possession of a gun and the other for receipt of the same gun, were essentially identical and violated the double jeopardy clause. The Ninth Circuit found this argument to be without merit and held that the receipt of the gun was a new and separate offense from possession of the gun, as it required proof of different facts.¹¹⁷⁵

2. Attachment of jeopardy

"Jeopardy does not attach . . . until a defendant is put to trial before the trier of the facts."¹¹⁷⁶ In a jury trial, the defendant is first exposed to jeopardy when the jury is impaneled.¹¹⁷⁷ In a nonjury trial, jeopardy attaches when the court begins to hear evidence.¹¹⁷⁸

1170. *See* *Ciucci v. Illinois*, 356 U.S. 571, 572 (1958) (each of four murders, although apparently taking place at same time, prosecuted singly at separate trials).

1171. 588 F.2d 1235 (9th Cir. 1978).

1172. *Id.* at 1241.

1173. *See, e.g., Harris v. United States*, 359 U.S. 19 (1959) (although evidentiary facts necessary to support a conviction for purchasing heroin and a conviction for receiving and concealing the same heroin were the same, ultimate facts were different); *Gore v. United States*, 357 U.S. 386 (1958) (consecutive sentences imposed for three counts of selling narcotics affirmed, even though convictions were all based on same sale).

1174. 579 F.2d 1151 (9th Cir. 1978).

1175. *Id.* at 1154.

1176. *Serfass v. United States*, 420 U.S. 377, 388-89 (1975) (jeopardy had not attached when district court dismissed indictment because petitioner had not been put to trial).

1177. *Id.*; *Illinois v. Somerville*, 410 U.S. 458, 466-71 (1973) (trial court declared mistrial after jury had been selected and sworn).

1178. *Serfass v. United States*, 420 U.S. 377, 388 (1975) (jeopardy had not attached when district court had before it only a motion for dismissal of indictment). *See United States v. Choate*, 527 F.2d 748, 751 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976) (government

There are some circumstances in which the first trial may be terminated after jeopardy has attached, but, short of final judgment, will not sustain the claim of double jeopardy. These circumstances include a mistrial if a "manifest necessity" for declaring a mistrial existed or "the ends of public justice would otherwise be defeated" by allowing the trial to proceed.¹¹⁷⁹ In *United States v. Hooper*,¹¹⁸⁰ the Ninth Circuit held that principles of double jeopardy did not prevent the defendant's retrial after the trial court had declared a mistrial. After hearing the government's opening statement and the testimony of two witnesses, the district judge noted that he had mistakenly impaneled less than the required twelve jurors and that, unless the parties stipulated to six jurors, he must declare a mistrial. When the defendant declined to waive his right to a twelve-member jury, the court declared a mistrial, dismissed the panel, and reset the case. The defendant's subsequent motion to dismiss on double jeopardy grounds was denied, and the newly impaneled jury convicted him. Reasoning that continuance would have been an obvious procedural error requiring reversal, the Ninth Circuit held that the declaration of mistrial was of "manifest necessity" and in conformity with the ends of public justice, thus precluding the defendant's double jeopardy claim.¹¹⁸¹

3. Collateral estoppel

The doctrine of collateral estoppel is embodied in the fifth amendment's double jeopardy prohibition. Accordingly, an acquittal based on a factual issue, also presented as an essential element of a second charge, necessarily bars trial on that charge.¹¹⁸² Charged initially with overbilling the government for legal services provided to minority businessmen, the defendant in *United States v. Hernandez*¹¹⁸³ testified at trial to the number of hours spent giving legal advice to a partner in a certain business. Subsequent to a judgment of acquittal entered by the court, this partner was located and asserted that he had never had any

could appeal from a dismissal of indictment charging income tax evasion as jeopardy had not yet attached because motions alleging improper counsel occurred prior to trial).

1179. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (jury discharge for failure to agree to verdict without consent of prisoner does not bar a subsequent trial for same offense).

1180. 576 F.2d 1382 (9th Cir. 1978).

1181. *Id.* at 1383.

1182. *Ashe v. Swenson*, 397 U.S. 436, 443-45 (1970) (since jury in first trial had determined by its verdict that petitioner was not one of the robbers, the State was constitutionally foreclosed from relitigating that issue in another trial).

1183. 572 F.2d 218 (9th Cir. 1978).

such meetings with the defendant. A perjury indictment was then returned against the defendant, charging that he had lied regarding his meetings with the partner, and he was convicted.

The Ninth Circuit found the issue in both trials to be the number of hours that the defendant had spent with the partner giving legal advice. Reasoning that the acquittal in the first case meant that the judge had necessarily decided that the defendant's relevant testimony was true, the court held that collateral estoppel foreclosed the Government from prosecuting the defendant for perjury.¹¹⁸⁴

4. Government appeals

The double jeopardy clause was designed to protect defendants against the possibility of a second trial with its attendant embarrassment, expense and ordeal. The doctrine, therefore, normally prevents a direct attack by the prosecutor upon a verdict of acquittal.¹¹⁸⁵

If a successful government appeal will not result in the defendant's subjection to a second trial but will merely reinstate the jury's guilty verdict, the defendant's double jeopardy interests are not implicated.¹¹⁸⁶ In *United States v. Dreitzler*,¹¹⁸⁷ for example, the defendant was convicted by a jury on twenty-three counts of willfully misapplying bank funds. Thereafter, the district court granted the defendant's motion for judgment of acquittal on all counts. The defendant asserted that the Government's subsequent appeal violated double jeopardy. Reasoning that reinstatement of the verdicts, should the Government prevail on appeal, would not subject the defendant to multiple prosecutions, the Ninth Circuit held that double jeopardy did not preclude the appeal.¹¹⁸⁸

The defense of double jeopardy is available only when the defendant is twice placed in jeopardy by the same government for the same of-

1184. *Id.* at 222. *Cf.* *United States v. Dipp*, 581 F.2d 1323 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 841 (1979), in which a perjury conviction arising out of false testimony did not directly relate to the conspiracy for which the defendant was being tried. Therefore, the jury verdict of acquittal on the charged conspiracy did not necessarily determine whether the jury believed the defendant's testimony and collateral estoppel was not applied.

1185. *See United States v. Rojas*, 554 F.2d 938, 941 (9th Cir. 1977) (no double jeopardy when government appeals court's post-trial grant of motion to set aside jury verdict of guilty).

1186. *Forman v. Wolff*, 590 F.2d 283 (9th Cir. 1978) (remand to custody subsequent to order of release did not violate double jeopardy when prior resolution of guilt could be reinstated).

1187. 577 F.2d 539 (9th Cir. 1978).

1188. *Id.* at 433.

fense.¹¹⁸⁹ A single act, however, may offend the peace and dignity of both federal and state sovereigns and therefore may be punished by both.¹¹⁹⁰

Mindful of the potential for abuse in a rule permitting duplicate prosecutions, the Supreme Court has noted that "[t]he greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy."¹¹⁹¹ In response to the fairness implications of the multiple prosecution power, the Department of Justice adopted a policy of refusing to bring a federal prosecution following a state prosecution, except when necessary to advance compelling federal law enforcement interests.¹¹⁹² In *United States v. Mikka*,¹¹⁹³ however, the defendant was acquitted in state court in July 1977 on charges of armed robbery. In January 1978, he was indicted by a federal grand jury on three counts of possession of a firearm by a felon stemming from the same armed robbery. Following a jury verdict of guilty on all three counts, the defendant appealed, arguing that the federal prosecution contravened the Department of Justice policy. The Ninth Circuit disagreed, reasoning that the identity of charges necessary to invoke the policy was lacking.¹¹⁹⁴

VII. JUVENILE OFFENDERS

Federal criminal sentencing laws afford juvenile offenders different treatment than that provided to adults by statute.¹¹⁹⁵ Thus, a defendant under eighteen years of age is eligible for sentencing pursuant to

1189. *Abbate v. United States*, 359 U.S. 187, 188-89 (1959) (federal prosecution for conspiracy to destroy federal communications facilities not barred under double jeopardy by state prosecution for conspiracy to destroy property of another). *Cf. Bartkus v. Illinois*, 359 U.S. 121, 132, 136 (1959) (prosecution for violation of state robbery statute, after a prior acquittal for federal offense on substantially the same evidence, did not violate fourteenth amendment due process).

1190. *United States v. Lanza*, 260 U.S. 377, 382 (1922) (federal government counts for processing a still were not barred by prior state court judgment).

1191. *Bartkus v. Illinois*, 359 U.S. 121, 138 (1959) (prosecution for violation of state robbery statute, after a prior acquittal for a federal offense on substantially the same evidence).

1192. *United States Attorney's Manual*, § 9-2.142.

1193. 586 F.2d 152 (9th Cir. 1978).

1194. *Id.* at 154.

1195. Underlying the use of special treatment for youthful offenders is the failure of traditional methods to curb juvenile recidivism. *See Dorszynski v. United States*, 418 U.S. 424, 432-33 (1974) (nineteen-year old pleaded guilty to knowing and intentional possession of approximately 1,000 LSD tablets and was sentenced pursuant to the Federal Youth Corrections Act). *See also* H. R. REP. NO. 2979, 81st Cong., 2d Sess., 2-3, reprinted in [1950] U.S. CODE CONG. & AD. NEWS 3983, 3985.

the Federal Juvenile Delinquency Act,¹¹⁹⁶ and a court may impose sentence upon a defendant between the ages of eighteen and twenty-two under provisions of the Federal Youth Corrections Act.¹¹⁹⁷ A "young adult offender"¹¹⁹⁸ being tried as an adult may also be sentenced pursuant to the Federal Youth Corrections Act if "the court finds that there are reasonable grounds to believe that the defendant will benefit from treatment provided under [that Act]."¹¹⁹⁹

Regulations promulgated during 1976 provide that a youth offender's sentence runs continuously from the date of his conviction. It is only when the juvenile is on bail pending appeal, in escape status, hiding from parole supervision, or serving time for civil contempt that the sentence period is tolled.¹²⁰⁰ In 1978, the Ninth Circuit applied this same rule to juveniles sentenced before the 1976 regulations took effect.¹²⁰¹

Since 1976, when the Federal Youth Corrections Act became applicable to youth offenders,¹²⁰² the Parole Commission¹²⁰³ has had to de-

1196. 18 U.S.C. §§ 5031-5042 (1976). *See* United States v. Hill, 538 F.2d 1072, 1074 (9th Cir. 1976) (seventeen-year old convicted of bank robbery sentenced pursuant to the Juvenile Delinquency Act) (purpose of Act is "to be helpful and rehabilitative rather than punitive, and to reduce . . . the stigma of criminal conviction"). A juvenile not surrendered to state authorities must be proceeded against under the federal juvenile delinquency statutes, unless he has requested in writing, on advice of counsel, to be proceeded against as an adult. 18 U.S.C. § 5032 (1976).

1197. 18 U.S.C. §§ 5005-5026 (1976). The Act gives the sentencing trial judges four options: (1) suspending imposition or execution of sentence by placing the offender on probation; (2) sentencing the offender to treatment and supervision at a special youth facility, to be discharged in no more than six years; (3) committing the offender to a youth institution for a term exceeding six years, up to the maximum period authorized by law for the offense; or (4) sentencing the offender as an adult. *Id.* § 5010(a)-(d).

1198. A person between the ages of 22 and 26 is referred to as a "young adult" offender. *Dorszynski v. United States*, 418 U.S. 424, 433 n.9 (1974).

1199. 18 U.S.C. § 4216 (1976).

1200. Parole, Release, Supervision and Recommitment of Prisoners, Youth Offenders, and Juvenile Delinquents, 28 C.F.R. § 2.10(c) (1978).

1201. *Ogg v. Klein*, 572 F.2d 1379 (9th Cir. 1978) (youth who had been at large for five years had his youth offender status tolled by his escape). *See Suggs v. Daggett*, 522 F.2d 396, 397 (10th Cir. 1975) (youth sentenced under Youth Corrections Act at large for 82 days) ("It would be a mockery . . . to allow the escapee to employ time spent in an escape status in tabulating the . . . period of treatment . . ."); *Hartwell v. Jackson*, 403 F. Supp. 1229, 1230 (D.D.C. 1975), *aff'd mem.* 546 F.2d 1042 (D.C. Cir. 1976) (youth sentenced under Youth Corrections Act at large for one period of 44 days and a second period of 777 days) ("It is unrealistic to suggest that Congress intended to repeal this general rule [that an escape tolls the running of a sentence] by implication.").

1202. *De Peralta v. Garrison*, 575 F.2d 749, 751 (9th Cir. 1978) (Act did not apply to defendant sentenced under provisions of Youth Corrections Act in 1973 and up for parole in 1976). *See* 18 U.S.C. § 5017(a) (1976).

1203. 18 U.S.C. §§ 4201-4218 (1976).

termine: (1) whether or not release would "depreciate the seriousness of . . . [the] offense or promote disrespect for the law,"¹²⁰⁴ and (2) whether or not release would "jeopardize the public welfare."¹²⁰⁵ Because the Act may not be applied retroactively,¹²⁰⁶ the law in effect at the time of sentencing determines which factors the Parole Commission should consider.¹²⁰⁷

A juvenile processed pursuant to the Federal Juvenile Delinquency Act may have neither his fingerprints lifted nor his photograph taken without the written consent of the court.¹²⁰⁸ In *United States v. Duncan*,¹²⁰⁹ however, a juvenile defendant allowed his fingerprints to be taken pursuant to a grand jury subpoena without such written consent. Although refusing to decide whether the Act had been violated, the Ninth Circuit justified admission of the fingerprints into evidence by reasoning that the "illegality, if any, was not egregious, and . . . the giving of the statement . . . [was] sufficiently the product of an exercise of free will . . . to purge any taint resulting from the extra-judicial order to furnish fingerprints."¹²¹⁰

A conviction under the Federal Youth Corrections Act will be set aside automatically when the offender is unconditionally discharged before the expiration of either the maximum sentence imposed or the maximum period of probation initially fixed by the court.¹²¹¹ Under such circumstances, the conviction may not be used subsequently for impeachment purposes.¹²¹² In *United States v. Trejo-Zambrano*,¹²¹³ however, a vacated juvenile conviction was found to be properly admitted into evidence. The defendant in *Trejo-Zambrano* was charged with both conspiracy and possession of marijuana with intent to distribute. Although the prosecution furnished the defense with the record of a

1204. *Id.* § 4206(a)(1).

1205. *Id.* § 4206(a)(2).

1206. *White v. Warden*, 566 F.2d 57 (9th Cir. 1977) (appellant convicted of bank robbery and perjury not entitled to credit for 776 days spent on parole prior to effective date of Act). See *De Peralta v. Garrison*, 575 F.2d 749, 752 (9th Cir. 1978).

1207. *De Peralta v. Garrison*, 575 F.2d 749, 751 (9th Cir. 1978). In *De Peralta*, the Ninth Circuit held that under the law in effect at the time *De Peralta* was sentenced, the Parole Commission should have considered whether he was rehabilitated in deciding whether to release him on parole. *Id.* at 751-52.

1208. 18 U.S.C. § 5038(d)(1) (1976).

1209. 570 F.2d 292 (9th Cir. 1978) (*per curiam*).

1210. *Id.* at 293.

1211. 18 U.S.C. § 5021 (1976).

1212. FED. R. EVID. 609(c). Rule 609(c) reads in pertinent part: "Evidence of a conviction is not admissible . . . if . . . the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure"

1213. 582 F.2d 460 (9th Cir. 1978).

previous Youth Corrections Act conviction and the accompanying FBI rap sheet, defense counsel overlooked the clerk's docket sheet entry showing that the prior conviction had been vacated. The conviction record was consequently admitted into evidence without defense objection. Reasoning that the defense counsel's misreading of the docket entry "did not shift [to the prosecution] the responsibility of discovering that the Youth Corrections Act conviction had been vacated,"¹²¹⁴ the Ninth Circuit found the admission to be proper. The Government had discharged its duty of discovery and disclosure by supplying the defense with the relevant documents.¹²¹⁵

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1214. *Id.* at 465.

1215. *Id.*

